104

(1)

Supreme Court, U.S.
FILED

08-151 AUG 4 - 2008

OFFICE OF THE CLERK

No. 08-

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC MEUTI
KIMBERLY A. OLSON
Deputy Solicitors
SHARON A. JENNINGS
Assistant Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
State of Ohio

WILLIAM P. MARSHALL
6 Heather Court
Chapel Hill, NC 27517

Special Counsel for the
Attorney General of Ohio

QUESTION PRESENTED

Under the balancing test set forth in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), does a State's interest in preventing fraud in the electoral petition process justify a reasonable, nondiscriminatory business regulation that prohibits paying electoral petition circulators on a per-signature basis?

PARTIES TO THE PROCEEDING BELOW

The Petitioner is the State of Ohio. The Respondents are Citizens for Tax Reform and its treasurer.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES 1

INTRODUCTION 3

STATEMENT OF THE CASE 4

A. Petition circulators paid per signature have engaged in petition fraud in Ohio 4

B. To protect the petition circulation process from fraud, the State enacted Ohio Revised Code § 3599.111 6

C. CTR challenged Ohio Revised Code § 3599.111 under the First and Fourteenth Amendments 7

D. The district court granted summary judgment in favor of CTR, and the Sixth Circuit affirmed 8

E. Ohio has continued to experience fraud during the petition circulation process 9

ARGUMENT 11

A. The Sixth Circuit's decision created a conflict in authority among the lower courts 11

1. The Second, Eighth, and Ninth Circuits have upheld laws substantively identical to Ohio's 12

2. The Sixth Circuit's attempt to distinguish Ohio's statute from those at issue in *Person*, *Prete*, and *IRI* is unconvincing and legally unsound 13

B. The state interests at issue in this case—protecting the integrity of the ballot and preventing fraud and the appearance of fraud in the electoral process—are of paramount importance 17

1. Ohio's statute protects the integrity of the Ohio ballot 18

2. Ohio's statute prevents election fraud 20

a. The money flowing into States related to recent ballot issues has increased the risk of fraud 21

b. The States, including Ohio, seek to prohibit a business practice that directly rewards circulators for forging or fraudulently obtaining signatures 23

C. The Sixth Circuit misapplied *Timmons* balancing 24

1. CTR failed to show that Ohio's law severely burdens First Amendment rights 25

a. Ohio's law does not burden core political speech 26

b. Banning pay-per-signature fee arrangements does not severely burden CTR's constitutional rights 28

i. CTR offered only speculative and irrelevant evidence to support its claim 28

ii. The Oregon experience contradicts CTR's assertions that it is severely burdened 30

2. The Sixth Circuit minimized Ohio's interest in preventing election fraud

and discounted the evidence Ohio produced 31

a. States are not required to show empirical evidence of fraud 31

i. States do not need to suffer the adverse effects of petition fraud before legislating to protect the electoral process 32

ii. *Timmons* does not require a State to demonstrate a causal connection between the regulated activity and fraud 34

b. Even though no empirical evidence is required, Ohio put forth evidence documenting fraud 35

3. Ohio's law is constitutional under the *Timmons* balancing test 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases **Page(s)**

Anderson v. Celebrezze,
460 U.S. 780 (1983) 18

Blankenship v. Blackwell,
341 F. Supp. 2d 911 (S.D. Ohio 2004) 5

Buckley v. American Constitutional Law Foundation,
525 U.S. 182 (1999) 19, 26, 27, 37

Buckley v. Valeo,
424 U.S. 1 (1976) 26

Burdick v. Takushi,
504 U.S. 428 (1992) 18, 37

Citizens for Tax Reform v. Deters,
518 F.3d 375 (6th Cir. 2008) ..... *passim*

Clingman v. Beaver,
544 U.S. 581 (2005) 24

Crawford v. Marion County Election Board,
128 S. Ct. 1610 (2008) ..... *passim*

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,
485 U.S. 568 (1988) 17

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 18, 21

Gonzalez v. United States,
128 S. Ct. 1765 (2008) 16

Harris v. United States,
536 U.S. 545 (2002) 16

Initiative & Referendum Institute v. Jaeger,
241 F.3d 614 (8th Cir. 2001) 3, 11

Meyer v. Grant,
486 U.S. 414 (1988) ..... *passim*

Montanans for Justice v. State ex rel. McGrath,
146 P.3d 759 (Mont. 2006) 22

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 32, 33

Person v. N.Y. State Bd. of Elections,
467 F.3d 141 (2d Cir. 2006) 3, 11, 12, 13

Prete v. Bradbury,
438 F.3d 949 (9th Cir. 2006) ..... *passim*

Storer v. Brown,
415 U.S. 724 (1974) 18, 30

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) ..... *passim*

United States v. X-Citement Video, Inc.,
513 U.S. 64 (1994) 17

United States ex rel. Attorney General v. Delaware & Hudson Co.,
213 U.S. 366 (1909) 16

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 17

Wash. State Grange v. Wash. State Republican Party,
128 S. Ct. 1184 (2008) 17

Federal Constitutional Provisions and Statutes **Page(s)**

28 U.S.C. § 1331 1

42 U.S.C. §1983 1

United States Constitution, First Amendment ..... *passim*

United States Constitution, Fourteenth Amendment 1, 7

State Constitutional Provisions and Statutes **Page(s)**

2008 Neb. Laws 39 23

Mont. Code Ann. § 13-27-102 (2007) 23

N.D. Cent. Code § 12.1-32-01(5) 14

N.D. Cent. Code § 16-1-01-12(11) 15

N.Y. Elec. Law § 17-122 23

N.Y. Elec. Law § 17-122(4) 12, 15

N.Y. Elec. L. § 17-166 14

Ohio Const. art. II, § 1a 19

Ohio Const. art. II § 1b 19

Ohio Const. art. II, § 1c 19

Ohio Const. art. II, § 1g 19

Ohio Rev. Code § 2929.18(A) 14

Ohio Rev. Code § 2929.18(A)(3)(e) 14

Ohio Rev. Code § 2929.14(A)(5) 14

Ohio Rev. Code § 3599.111 ..... *passim*

Ohio Rev. Code § 3599.111(B) ..... *passim*

Ohio Rev. Code § 3599.111(D) 12, 14, 15

Ohio Rev. Code § 3599.111(E) 14

Or. Admin. R. 165-014-0260 ..... 14, 15

Or. Const. art. IV, § 1b 12, 14, 23

S.D. Codified Laws § 12-13-28 (2008) 23

Wyo. Stat. § 22-24-125 (2008) 23

Other Authorities **Page(s)**

Alan Johnson, Mark Niquette, and Jim Siegel, *Strip-club law might miss ballot; Most petition signatures invalid; some fraudulent*, Columbus Dispatch, Sept. 21, 2007 10

David Lieb, *Senate pulls pay-per-signature ban from measure*, The Columbia Tribune, May 13, 2008 4

Jocelyn Freidrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 Fordham Urb. L.J. 889 (Apr. 2007) 23

K. K. DuVivier, *Perspectives: Ballot Initiatives and Referenda: Out of the Bottle: The Genie of Direct Democracy*, 70 Alb. L. Rev. 1045 (2007) 20, 22

Richard J. Ellis, *Symposium Article: Signature Gathering in the Initiative Process: How Democratic is it?*, 64 Mont. L. Rev. 35 (2003) 22

Richard B. Collins and Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L. Rev. 47 (Winter 1995) 22

Robin E. Perkins, *A State Guide to Regulating Ballot Initiatives: Reevaluating Constitutional Analysis Eight Years After* Buckley v. American Constitutional Law Foundation, 2007 Mich. St. L. Rev. 723 ..... 21, 23

OPINIONS AND ORDERS BELOW

The opinion below is *Citizens for Tax Reform v. Deters*, 518 F.3d 375 (6th Cir. 2008).

BASIS FOR JURISDICTION

The Sixth Circuit entered judgment in this case on March 5, 2008. The State of Ohio did not seek rehearing before the Sixth Circuit, but instead sought a sixty-day extension from this Court, which the Court granted on May 27, 2008.

Plaintiffs Citizens for Tax Reform and its treasurer filed their First Amendment claim under 42 U.S.C. §1983, so this Court has jurisdiction over the case by virtue of 28 U.S.C. § 1331's provision of federal-question jurisdiction.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section One of the Fourteenth Amendment to the United States Constitution provides, "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Ohio Revised Code § 3599.111 provides:

> (A) As used in this section, "registering a voter" or "registering voters" includes any effort, for compensation, to provide

voter registration forms or to assist persons in completing or returning those forms.

(B) No person shall receive compensation on a fee per signature or fee per volume basis for circulating any declaration of candidacy, nominating petition, initiative petition, referendum petition, recall petition, or any other election-related petition that is filed with or transmitted to a board of elections, the office of the secretary of state, or other appropriate public office.

(C) No person shall receive compensation on a fee per registration or fee per volume basis for registering a voter.

(D) No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked.

(E)(1) Whoever violates division (B) of this section is guilty of receiving improper compensation for circulating a petition, a felony of the fifth degree.

(2) Whoever violates division (C) of this section is guilty of receiving improper compensation for registering a voter, a felony of the fifth degree.

> (3) Whoever violates division (D) of this section is guilty of paying improper compensation for circulating a petition for registering a voter, a felony of the fifth degree.

INTRODUCTION

Ohio asks the Court to resolve lower-court confusion over the application of *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), to state laws regulating the petition process. In considering Ohio Revised Code § 3599.111, the U.S. Court of Appeals for the Sixth Circuit misapplied *Timmons* to Ohio's business regulation prohibiting circulators of any election-related petition from being compensated by the signature. The Court should grant the petition and review this case for three reasons.

First, the three other circuits that have considered measures similar to Ohio's law have held that statutes that regulate the method of payment—but do not prohibit the use of paid circulators—comply with the First Amendment. See *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2nd Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). In each case, the court determined that these statutes did not impose a severe burden on speech and were reasonable, nondiscriminatory restrictions that serve important state interests. By deviating from this correct analysis, the Sixth Circuit created a division of authorities among the courts of appeal.

Second, States have a vital interest in protecting their electoral processes, including the process by which a candidate or an initiative gets onto the ballot. The Sixth Circuit's decision convolutes what States may do to protect their electoral systems, and this confusion will affect not only lower-court analysis but also States' responses to petition fraud. See, e.g., David Lieb, *Senate pulls pay-per-signature ban from measure*, The Columbia Tribune, May 13, 2008 (citing the Sixth Circuit decision as reason for Missouri legislators stripping pay-per-signature ban from election reform bill).

Third, under *Timmons* balancing, the Sixth Circuit should have compared the strong state interest in protecting ballot integrity with the minimal burden on Citizens for Tax Reform ("CTR"). Instead, the Sixth Circuit required too much of the State and too little of the plaintiff. Allocating the evidentiary burden in this way will make it easy for plaintiffs to challenge—and difficult for States to defend—regulations in the future.

STATEMENT OF THE CASE

A. Petition circulators paid per signature have engaged in petition fraud in Ohio.

Ohio has suffered numerous instances of petition fraud. For example, in connection with the 2004 presidential election, Ohio discovered that a large number of invalid and fraudulent signatures were submitted by Ralph Nader in his attempt to get onto the ballot. Nader supporters submitted a nominating petition purporting to contain 14,473 valid signatures. (R. 9; Memo. in Opp'n to TRO, Ex. 3, Nader Findings of Fact at 1; Joint Appendix to

Sixth Circuit case no. 07-3031 ("J.A.") at 46). After review by the county boards of elections, the Secretary of State determined that only 6,464 signatures were valid. (*Id.* at 1-2; J.A. at 46-47). Protesters then contested a large number of these signatures as obtained in violation of Ohio election law and/or fraudulently. After a multiple-day hearing, a hearing officer for the Secretary of State invalidated an additional 2,756 signatures based on detailed evidence of election fraud and forgery. (*Id.* at 30-31; J.A. at 75).

During the Nader hearing, the evidence established that petition circulators (who were paid by the signature) falsely identified themselves as residents of the State of Ohio and forged signatures. At least one circulator lied and told signers that they were signing a petition opposing same-sex marriage. (R. 9; Memo. in Opp'n to TRO, Ex. 3, Nader Findings of Fact and Concl. of Law; J.A. at 48-72; R. 9; Memo. in Opp'n to TRO, Ex. 4, Nader Tr. 17-198; portions at J.A. 79-127); see also *Blankenship v. Blackwell*, 341 F. Supp. 2d 911, 914-15 (S.D. Ohio 2004) (discussing evidence of fraud related to the Nader petitions).

No one disputes that the perpetrators of this fraud were paid by the signature. Gregory Reese, who falsely signed circulator statements, testified that circulators were paid $4 per signature after reaching a certain quota. (R. 9; Memo. in Opp'n to TRO, Ex. 4, Nader Tr. 266-67; J.A. at 139-40). Theresa Amato, the national campaign manager for Nader, testified that the campaign was paying a company called JSM $1.50 per signature to gather signatures. (R. 9; Memo. in Opp'n to TRO, Ex. 7, Nader Tr. 868-70; J.A. at 149-51).

Ohio's experience with the Nader petition is just one instance of fraud and other irregularities owing to circulators who received per-signature payment. Director Bryan Williams of the Summit County Board of Elections denied hundreds of invalid petitions submitted by Wilbert Moore in 2004, who was paid by the signature. (R. 35; Williams Aff.; J.A. at 600-01). Moore's petitions were riddled with signatures designated as "not genuine." (See, e.g., R. 35; Williams Aff., Exs. A; J.A. at 692, 695, 700, 703, 704).

Criminal indictments also show examples of fraud committed by signature gatherers. For example, Kevin Dooley was indicted for False Election Registration and False Election Signatures for forging a signature in 2004 "as part of the ACORN and Project Vote voter registration project where he had been hired and was paid both an hourly rate and a fee per each new voter registered beyond a goal." (R. 37; Certified Copy of Indictment; J.A. at 746-49). Dooley ultimately pleaded guilty to one of the charges, received a suspended sentence, and was placed on probation. See http://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/case, Search for Case No. 04 CR 5764 (last accessed on 7/30/08).

B. To protect the petition circulation process from fraud, the State enacted Ohio Revised Code § 3599.111.

In response to the documented instances of fraud and other issues that arose during the 2004 general election, the Governor of Ohio called a special session of the General Assembly to consider the reform of certain election statutes. As a result of

that special session, the General Assembly enacted H.B. 1, which the Governor signed on December 30, 2004. The statute—codified as Ohio Revised Code § 3599.111—took effect on March 31, 2005. During the course of this litigation, the statute was amended to its present form. The statute provides that "no person shall receive compensation on a fee per signature or fee per volume basis for circulating any . . . initiative petition" and that "compensation for collecting signatures on election-related petitions and for registering voters shall be paid solely on the basis of time worked." Ohio Rev. Code § 3599.111(B), (D).

C. CTR challenged Ohio Revised Code § 3599.111 under the First and Fourteenth Amendments.

CTR filed this case seeking injunctive and declaratory relief. It averred that Ohio Revised Code § 3599.111 severely burdens CTR's rights under the First and Fourteenth Amendments, as well and impairs an existing contract with a consultant to oversee the circulation of CTR's petitions. (R. 1; Compl. ¶ 1; J.A. at 9-10). At the time, CTR was circulating a petition proposing an amendment to the Ohio Constitution for inclusion on the ballot at the 2006 general election. (R. 1; Compl. ¶ 15; J.A. at 13-14).[1]

---

[1] On May 22, 2006, CTR formally withdrew its petition. However, CTR's current treasurer and former treasurer averred that the organization will circulate other petitions in the future. (R. 29; CTR's Mot. for Summ. J., Ex. 3, Mead Decl.; J.A. at 270-73; *id.* Ex. 4; Ledbetter Decl.; J.A. at 274-78).

Plaintiffs asserted that their costs to obtain signatures will increase substantially if their contractor cannot pay by the signature, but instead must pay its circulators by the hour. (R. 29; CTR's Mot. for Summary Judgment at 11-15; J.A. at 176-80). CTR asserts that its evidence demonstrates that the cost to qualify an issue will rise substantially and that professional petition circulators will be less likely to travel to Ohio to circulate petitions if Ohio's law is allowed to take effect.

D. The district court granted summary judgment in favor of CTR, and the Sixth Circuit affirmed.

The district court found that Ohio's statute would severely burden Plaintiffs' rights. *Citizens for Tax Reform v. Deters*, 462 F. Supp. 2d 827, 832 (S.D. Ohio 2006). The district court also concluded that Ohio had to prove that the fraud that occurred in Ohio would not have occurred but for the fact that the circulators in question were paid by the signature. *Id.* The court applied strict scrutiny and enjoined Ohio's statute. *Id.* at 832, 838.

On appeal, the Sixth Circuit first looked at the effects of Ohio's statute and determined that the primary burden is financial. Based on its review of the record, the court concluded that there was not a genuine issue of material fact because: (1) Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive; and (2) professional coordinators and circulators would likely not work under a per-time-only system. *Citizens for Tax Reform*, 518 F.3d at 385. At the same time, however, the court noted that "CTR has not pointed to any evidence showing that, outside a

relatively small number of professional circulators, there exists a substantial number of people or a demonstrable percentage of Ohio's population who would participate under a per-signature system but not under a per-time-only system." *Id.* at 383. Further, the court found, "[a]t best, CTR has raised a question of fact whether validity rates are lower under a per-time-only scheme." *Id.* at 385.

Nevertheless, the Sixth Circuit, applying strict scrutiny, held that the statute was not narrowly tailored to achieve the State's compelling interest. *Id.* at 387-88. The Sixth Circuit concluded that statutes that provide for the punishment of election fraud are "'adequate' to deter improper conduct with regard to petition circulation, 'especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.'" *Id.* at 388 (quoting *Meyer v. Grant*, 486 U.S. 414, 427 (1988)).

The Sixth Circuit also distinguished cases from other circuits upholding similar payment-by-signature bans on grounds that the Ohio statute purportedly imposes harsher sanctions and is more restrictive than the other provisions in regulating methods of payment. *Id.* at 385.

E. Ohio has continued to experience fraud during the petition circulation process.

While Ohio Revised Code § 3599.111 has been enjoined, Ohio has continued to experience fraud.[2]

---

[2] Ohio moved for permission to supplement the record in response to reports of fraud in 2006; the district court denied the motion. (R. 57; Mot. to Supplement; J.A. at 872-74; Docket Sheet of the District Court; J.A. at 7). Because the decision to

During the 2006 election cycle, media outlets reported instances of petition fraud committed by paid circulators. News reports detailed voter registrations being completed by the deceased in Cuyahoga and Franklin Counties, as well as forged signatures on petitions in support of a ballot issue in Bellefontaine, Ohio. (R. 57; Mot. to Supplement; J.A. at 872-74).

Yet again, in 2007, media reports detailed questionable signatures submitted by signature gatherers working on a referendum effort to repeal Senate Bill 16, which regulates adult entertainment establishments. Several Ohio county boards of elections noted validity rates of only 26%-33% on petitions. See Alan Johnson, Mark Niquette, and Jim Siegel, *Strip-club law might miss ballot; Most petition signatures invalid; some fraudulent*, Columbus Dispatch, Sept. 21, 2007, at A1. Directors of the Boards of Elections for the counties containing Toledo, Cleveland, and Cincinnati all noted that some of the signatures appeared to be fraudulent. *Id.* In fact, in Lucas County, an assistant prosecutor was quoted as saying that the petitions obviously contained fraudulent signatures, and that in 10 years on the job, "[i]t's probably the worst I've seen." *Id.* In Ashland County, a deceased judge's name appeared on a petition form, along with other deceased individuals. *Id.*

---

extend discovery is one that is within the trial court's discretion, Ohio did not pursue an appeal from the denial of this motion. While not part of the record in this case, these reports of additional instances of fraud are certainly relevant to the question of whether this Court should hear this case and the importance of the State's interests.

Thus, each election cycle since the close of evidence in this case has yielded additional evidence of fraud committed by paid petition circulators.

ARGUMENT

A. The Sixth Circuit's decision created a conflict in authority among the lower courts.

The decision below created a division in authority among the circuit courts. Before the Sixth Circuit's decision, the Second, Eighth, and Ninth Circuits each had concluded that substantively identical provisions pose no First Amendment problems. See *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006); *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006); *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) ["*IRI*"]. Rather than follow these well-reasoned precedents, the Sixth Circuit read Ohio's statute in an unjustifiably broad fashion in an attempt to distinguish it from these other States' indistinguishable provisions. The Sixth Circuit compounded this error by ignoring the canon of constitutional avoidance and thus reading an arguably ambiguous provision in a manner that *creates*, rather than avoids, a constitutional problem. The appeals court should have applied the avoidance canon to reach the same result as the Second, Eighth, and Ninth Circuits on the constitutionality of pay-per-signature regulations.

1. The Second, Eighth, and Ninth Circuits have upheld laws substantively identical to Ohio's.

Contrary to the Sixth Circuit's purported distinctions, the laws at issue in *Person*, *Prete*, and *IRI* are substantively indistinguishable from Ohio's law. Ohio Revised Code § 3599.111 prohibits pay-per-signature for signature gatherers. The provision states, "No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked." Ohio Rev. Code § 3599.111(D). Echoing Ohio's law, the Oregon constitutional provision at issue in *Prete* prohibits paying circulators "based on the number of signatures obtained on an initiative or referendum petition," and allows only payment methods that are "not based, either directly or indirectly, on the number of signatures obtained." Or. Const. art. IV, § 1b. The New York and North Dakota laws under review in *Person*, 467 F.3d 141, and in *IRI*, 241 F.3d 614, are also substantively identical to Ohio's. New York's statute makes it a misdemeanor to compensate signature-gatherers "upon the basis of the number of names to such petition procured by such person, or at a fixed amount per name." N.Y. Elec. Law § 17-122(4). North Dakota's law, in turn, prohibits payment "'on a basis related to the number of signatures obtained.'" *IRI*, 241 F.3d at 616 (quoting N.D. Cent. Code § 16.1-01-12(11) (1997)).

The *Prete*, *Person*, and *IRI* courts—unlike the Sixth Circuit below—upheld these statutes against First Amendment challenges. Applying the balancing test set forth in *Timmons*, 520 U.S. 351,

these courts properly held that pay-per-signature bans do not impose a severe burden on speech, and that the State's important interest in combating election fraud justifies any minor burdens. See *Person*, 467 F.3d at 143; *Prete*, 438 F.3d at 963-68; *IRI*, 241 F.3d at 617-18.

2. The Sixth Circuit's attempt to distinguish Ohio's statute from those at issue in *Person*, *Prete*, and *IRI* is unconvincing and legally unsound.

Rather than following this clear precedent, the Sixth Circuit manufactured two artificial distinctions between the Ohio statute and those at issue in *Person*, *Prete*, and *IRI*. First, the appeals court said that the Ohio law provides for more severe punishments than the other laws. Second, the Sixth Circuit said that the Ohio statute makes circulating petitions comparatively more expensive than do other States' provisions, and thus imposes a greater burden on speech. Neither distinction withstands analysis.

The Ohio statute's penalties are nearly indistinguishable from those imposed under the other laws. The only ascertainable difference between the Ohio statute and those of the other States is that Ohio's law styles a violation as a felony, while the others classify violations as misdemeanors. But whether they are called "felonies" or "misdemeanors," violations are punished similarly in Ohio, New York, Oregon, and North Dakota.

The maximum jail sentence under Ohio's statute is identical to the maximum sentences under

New York's and North Dakota's. Under Ohio Revised Code § 3599.111(E), a violation of § 3599.111(D) is a fifth-degree felony. Accordingly, anyone convicted of violating § 3599.111(D) is subject to six to twelve months of incarceration, plus up to $2500 in fines. See Ohio Rev. Code §§ 2929.14(A)(5), 2929.18(A)(3)(e). The financial sanction, however, is not mandatory. Ohio Rev. Code § 2929.18(A). Like Ohio, both New York and North Dakota subject violators of the pay-per-signature ban to up to a year in prison, in addition to fines. *Citizens for Tax Reform*, 518 F.3d at 386 (citing N.Y. Elec. L. § 17-166 and N.D. Cent. Code § 12.1-32-01(5)).

Nor do Ohio's fines significantly differ from the others. Ohio's statute makes financial sanctions optional, while Oregon's imposes a mandatory fine. Ohio's fines are also less severe than Oregon's. Oregon imposes a mandatory fine of at least $100 for each individual signature sheet containing signatures collected on a pay-per-signature basis, Or. Admin. R. 165-014-0260, and unlike Ohio, Oregon imposes no upper limit on the amount of fines, *id.* Moreover, although the maximum fine under Ohio's statute is greater than the maximum fine under New York's or North Dakota's, it is only slightly so. While North Dakota sets the maximum fine at $2000, Ohio set it at $2500. Such a small difference is hardly sufficient to create a meaningful distinction.

Moreover, Ohio's statute is not significantly broader than the provisions at issue in *Prete* and *IRI*. As noted above, Oregon's constitution prohibits basing circulators' pay "*directly or indirectly*, on the number of signatures obtained." Or. Const. art. IV, § 1b (emphasis added). Similarly, North Dakota's

statute prohibits payment "on a basis *related to* the number of signatures obtained," N.D. Cent. Code § 16-1-01-12(11) (emphasis added), and New York's bans payment "upon the basis of the number of names to such petition procured by such person." N.Y. Elec. Law § 17-122(4). These provisions are just as broad as Ohio's requirement that signature gatherers be paid "on the basis of time worked." Ohio Rev. Code § 3599.111(D).

The Sixth Circuit attempted to distinguish Ohio's statute from other States' laws by reading the Ohio provision as prohibiting practices that the other statutes permit. Specifically, Oregon's ban on payment methods based "directly or indirectly on the number of signatures obtained" still permits:

> paying an hourly wage or salary, establishing either express or implied minimum signature requirements for circulators, terminating circulators who do not meet the productivity requirements, adjusting salaries prospectively relative to a circulator's productivity, and paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis.

Prete, 438 F.3d at 952 n.1 (quoting Or. Admin. R. 165-014-0260). The Sixth Circuit used this passage to distinguish Ohio's provision from Oregon's. But with the possible exception of the discretionary bonus (which would not be based on hours worked), Ohio's statute permits each payment method listed by the Ninth Circuit, because each of these methods can be tied to the number of hours worked. Under

Ohio's statute, a petition-circulating firm could give prospective hourly raises to highly productive signature-gatherers. Similarly, a firm could dismiss signature-gatherers whose performance was poor. Nevertheless, the Sixth Circuit concluded that under the statute, "[a]rguably, CTR could not terminate a circulator who consistently did not collect enough signatures." *Citizens for Tax Reform*, 518 F.3d at 386.

The Sixth Circuit's interpretation is not supported by the text of the statute, which prohibits nothing of the kind. Moreover, as will be discussed in the next section, the strength of the State's interest underlying the statute and the limited burden the provision imposes on CTR's speech suggest that even the Sixth Circuit's overly broad reading of the statute should be upheld. But if the Sixth Circuit was concerned that a broad reading of the statute would lead to constitutional infirmity, its duty under the canon of constitutional avoidance would be to construe the statute to avoid constitutional difficulties—not to interpret the provision in a way that creates a constitutional problem.

"Under the avoidance canon, 'when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."'" *Gonzalez v. United States*, 128 S. Ct. 1765, 1771 (2008) (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002), in turn quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, (1909)). The avoidance canon applies in First Amendment

cases. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69, 78 (1994); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988).

Beyond ignoring the avoidance canon, this analysis also runs afoul of this Court's recent admonition not to "speculate about 'hypothetical' or 'imaginary' cases" when undertaking constitutional analysis. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008). The Sixth Circuit's opinion below therefore creates not only a conflict among the circuits in the conclusion reached, but also a conflict between it and the required method of constitutional analysis established by this Court.

B. The state interests at issue in this case—protecting the integrity of the ballot and preventing fraud and the appearance of fraud in the electoral process—are of paramount importance.

The Sixth Circuit's creation of a division of authority among the circuits especially warrants this Court's review because the appeals court diminished the State's vital electoral interests. Ohio's prohibition on pay-per-signature applies to election-related petitions, including petitions to establish candidacy, to recall an official, to place a referendum or initiated statute on the ballot, or to amend the Ohio Constitution. See Ohio Rev. Code § 3599.111(B). As such, the Ohio statute protects the integrity of the ballot and Ohio's constitutional rights of initiative and referendum by ensuring that only those candidates and measures receiving the

support required by Ohio law appear on the ballot. Equally important, Ohio Revised Code § 3599.111(B) combats fraud in the circulation process. These interests, protecting the integrity of the ballot and preventing fraud in the electoral process, are vital to all States and are undermined by the Sixth Circuit's decision here.

1. Ohio's statute protects the integrity of the Ohio ballot.

"As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). And indeed, the *Timmons* standard of review accommodates both the essential interests of the States in regulating elections as well as the First Amendment rights of those who associate for the purpose of advancing common political goals. See *Timmons*, 520 U.S. at 357-58; see also *Burdick*, 504 U.S. at 433-34. This Court has recognized that the States' interests include "protecting the integrity, fairness, and efficiency of their ballots and election processes." *Timmons*, 520 U.S. at 364; see also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (observing that state regulatory interests, including "[p]reserving the integrity of the electoral process . . . are interests of the highest importance").

Ohio's statute protects the integrity of the ballot by helping to ensure that the candidates and issues on the ballot have the support mandated by Ohio law. See *Anderson v. Celebrezze*, 460 U.S. 780, 788

n.9 (1983) ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot . . . ."). And signatures play a critical part in the Ohio Constitution's rights of referendum and initiative. First, in order to amend the Ohio Constitution, a proponent must submit petitions containing signatures totaling 10% of the votes cast in the previous gubernatorial election (the "required total"). Ohio Const. art. II, §§ 1a, 1g. Second, in order to subject a statute to a referendum vote, a proponent must submit petitions containing signatures totaling 6% of the required total. *Id.* at art. II, §§ 1c, 1g. Finally, in order to place an initiated statute on the ballot, a proponent must first submit to the General Assembly a petition containing signatures totaling 3% of the required total, and then submit a supplemental petition containing an additional 3%. *Id.* at art. II, §§ 1b, 1g. Further, proponents of each type of ballot issue must satisfy a county distribution requirement and obtain signatures totaling a specified percentage from at least 44 of Ohio's 88 counties. *Id.* at art. II, §1g. Thus, the interest Ohio seeks to protect is more than simply the State's right to enact statutes regulating elections; it seeks to protect the process that the people have mandated in the Ohio Constitution.

The State's interests in protecting the integrity of its ballot are the same regardless of whether the statute regulates candidates or issue proponents. In *Buckley v. American Constitutional Law Foundation*, the Court recognized a similarity between initiative-petition circulators and candidate petition circulators because "both seek ballot access." 525 U.S. 182, 191 (1999). Thus, "States allowing ballot initiatives have

considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Id.*

Furthermore, the differences between ballot issues and the selection of candidates have blurred as of late. Political parties have discovered that ballot issues can be used to increase turnout among different segments of voters, and ballot issues are now sometimes used at least in part for their effect on other races. K. K. DuVivier, *Perspectives: Ballot Initiatives and Referenda: Out of the Bottle: The Genie of Direct Democracy*, 70 Alb. L. Rev. 1045, 1047-50 (2007).

In the end, Ohio's constitutional prerequisites to the exercise of the rights of initiative and referendum are meaningless if Ohio is not permitted to enforce them. Issues must meet these standards to be placed on the ballot, and thus the signature requirements are the equivalent of the statutes that prescribe the steps that a candidate must take to appear on the ballot. By not giving this interest due weight, as discussed below, and by hampering the State's efforts to regulate nothing more than a business practice, the Sixth Circuit's decision has ramifications for the other States that currently have similar statutes, as well as for all States that require signatures to place an initiative or candidate on the ballot.

2. Ohio's statute prevents election fraud.

The State also has important interests in preventing fraud and the appearance of fraud in the electoral process. "Preserving the integrity of the electoral process, preventing corruption, and

'[sustaining] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." *Bellotti*, 435 U.S. at 788-89 (citations omitted). By striking a statute that strives to prevent fraud before it occurs, the Sixth Circuit would limit Ohio to after-the-fact attempts to find, locate, and prosecute those who forge signatures or lie to obtain them.

a. The money flowing into States related to recent ballot issues has increased the risk of fraud.

Since this Court last addressed a state statute regulating an initiative process in 1999, there has been both an increase in the amount of money expended on ballot issues and numerous reported instances of fraud in the petition circulation process.

Expenditures on ballot issues have been increasing dramatically. In the 1997-98 election cycle, spending for and against statewide initiatives totaled $257,053,852; in 2004, more than $398,000,000 was spent on statewide initiatives. Robin E. Perkins, *A State Guide to Regulating Ballot Initiatives: Reevaluating Constitutional Analysis Eight Years After* Buckley v. American Constitutional Law Foundation, 2007 Mich. St. L. Rev. 723, 730. The year 2006 ranked as the third-largest year ever for ballot initiatives, with more than 200 measures on ballots in thirty-seven states. *Id.* at 724. Estimated expenditures on those issues that made the ballot in 2006 were near 400 million dollars. *Id.*

This money goes to professional firms specializing in the rapid collection of signatures, such as Arno Political Consultants, the firm used by CTR here. Professional firms now make millions in the months before elections. *Id.* at 730-31. "Gathering signatures has increasingly become a business, and like any other business it is run for profit." Richard J. Ellis, *Symposium Article: Signature Gathering in the Initiative Process: How Democratic is it?*, 64 Mont. L. Rev. 35, 37 (2003). The amount of money now flowing into the initiative process has led scholars to conclude that "[m]oney may also play at least as corrosive a role in initiative campaigns as it does in representative elections." DuVivier, *supra* p. 20, at 1048; see also *id.* at 1048 n.15 (citing other commentators).

Not surprisingly, given the influx of money into the process, States continue to experience petition fraud, including fraud committed by paid petition circulators. And significantly, payment-by-signature has been cited as a direct cause of this increase in fraud. See Richard B. Collins and Dale Oesterle, *Governing by Initiative: Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. Colo. L. Rev. 47, 75 (Winter 1995) ("The use of circulators paid on a commission basis by signature . . . is one reason for the trend."). In 2006, for example, Oregon and Montana invalidated four different ballot issues after determining that fraud had been committed during the circulation process. See *In re Initiative Petition No. 379*, 155 P.3d 32 (Ok. 2006); *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759 (Mont. 2006). Also in 2006, the Michigan Civil Rights Initiative (MCRI) was plagued with allegations of fraud on the part of paid

circulators, although the Michigan Supreme Court did not remove the issue from the ballot. Perkins, *supra*, at 733-34; see also Jocelyn Freidrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 Fordham Urb. L.J. 889 (Apr. 2007).

b. The States, including Ohio, seek to prohibit a business practice that directly rewards circulators for forging or fraudulently obtaining signatures.

Ohio's statute combats fraud and the appearance of fraud by removing a direct incentive to unlawfully pad the number of signatures obtained. Rather than rely solely on the ability to discover and successfully prosecute those who violate Ohio's laws prohibiting election fraud, Ohio seeks to eliminate the motivation to commit the fraud. Thus, Ohio seeks to regulate not speech, but a specific troublesome business practice.

Ohio is not the first State to enact a statute prohibiting circulators from being paid by the signature in an attempt to deter fraud. Seven states currently have per-signature payment bans in effect. See Or. Const. Art IV, § 1b; Wyo. Stat. § 22-24-125 (2008); S.D. Codified Laws § 12-13-28 (2008); Mont. Code Ann. § 13-27-102 (2007); N.D. Cent. Code § 16.1-01-12 (11) (2008); N.Y. Elec. Law § 17-122 (2008); 2008 Neb. Laws 39. Four other States (Idaho, Maine, Mississippi, and Washington) enacted such bans, but had them stricken by district courts in cases in which, unlike here, the States presented "no evidence to support their assertions that a per-signature ban was necessary to promote the state

interest in preventing fraud and forgery in the initiative process." See *Prete*, 438 F.3d at 970 n.29 (citing cases).

Given the fraud that has occurred during the petition circulation process, this Court should take this case and vindicate the States' interest in preventing fraud and the appearance of fraud during that process.

C. The Sixth Circuit misapplied *Timmons* balancing.

The Court should also review the decision below, because the Sixth Circuit misapplied the Court's governing precedent of *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997). See *Citizens for Tax Reform*, 518 F.3d at 380, 387 (applying *Timmons* and concluding that Ohio's law violates CTR's First Amendment rights). *Timmons* requires a court to weigh the character and magnitude of the burden the State's rule imposes on constitutional rights against the interests the State contends justify that burden. *Timmons*, 520 U.S. at 358-59. Under *Timmons*, strict scrutiny applies only when a statute has a "severe burden" on speech. *Id.* at 358; see also *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring) ("'[S]trict scrutiny is appropriate only if the burden is severe.'") (quoting *Clingman v. Beaver*, 544 U.S. 581, 592 (2005))). A lesser burden triggers less-exacting review, and a State's important regulatory interests usually justify reasonable, nondiscriminatory restrictions. *Timmons*, 520 U.S. at 358.

In applying *Timmons*, however, the Sixth Circuit wrongly analyzed both the "severe burden" and "state interest" prongs. First, the court failed to require CTR to show that the law severely burdens CTR's constitutional rights. Second, the Sixth Circuit unjustifiably (and inconsistently with this Court's recent precedent) minimized Ohio's interest in preventing election-related fraud. As this Court recently recognized in *Crawford v. Marion County Election Board*, a State's interest in preventing election fraud is paramount. The Sixth Circuit thus should have recognized Ohio's interest and required CTR to demonstrate how Ohio's regulation severely burdens its rights.

1. CTR failed to show that Ohio's law severely burdens First Amendment rights.

While CTR argues that Ohio's ban on per-signature payment would significantly burden its First Amendment rights, its allegations do not support that legal conclusion. First, the law regulates only payment methodology; it prohibits no speech and curtails no message. Second, CTR's allegations show that any incidental burden on CTR's rights is minimal. Indeed, CTR shows only that the law burdens its vendor's preferred business model, and that in turn affects the economic relationship between CTR and the vendor. But that does not impair CTR's ability to communicate with voters, and it does not impair CTR's ability to achieve ballot access for its issues. Consequently, Ohio's law does not violate CTR's First Amendment rights.

a. Ohio's law does not burden core political speech.

Timmons requires the reviewing court to consider whether the law at issue burdens a *constitutional* right. See *Timmons*, 520 U.S. at 358. Here, Ohio's law does not directly burden core political speech; the law regulates only payment methodology, not the communicative aspect of signature-gathering. At most, CTR alleges an indirect effect on the number of voices it can buy to carry its message. But CTR's allegations do not rise to the level of a constitutional concern. The two U.S. Supreme Court decisions invalidating petitioner regulations—*Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999)—involved core First Amendment speech, not business regulations.

The statute in *Meyer* completely banned the use of paid circulators, which dramatically limited the number of voices to just volunteers. While the Court did not specifically quantify the loss of voices, the appeals court had found that the restriction "necessarily reduce[d] the quantity of expression." *Meyer*, 486 U.S. at 419 (internal citations omitted). The statute also barred proponents from using their money to amplify their speech. Not surprisingly, the Court compared that aspect of the ban to the invalidity of limits on independent political expenditures under *Buckley v. Valeo*, 424 U.S. 1 (1976). See *Meyer v. Grant*, 486 U.S. at 419 ("Thus, the effect of the statute's absolute ban on compensation of solicitors is clear [and is] like the campaign expenditure limitations struck down in *Buckley* [*v. Valeo*].") (internal quotations omitted).

Similarly, in *Buckley v. American Constitutional Law Foundation*, the Court found that requiring circulators to be registered voters significantly reduced the number of available voices. Only 65% of the voting-age population was registered to vote, so eliminating 35% of the population caused a direct "speech diminution of the very kind produced by the ban of paid circulators at issue in *Meyer*." *Buckley*, 525 U.S. at 193 n.15, 194.

Ohio's regulation, in contrast, affects merely the business arrangement between a petition circulator and a vendor. The ban on per-signature payment does not bar a single voice. Nor does Ohio's law prevent a citizen from using money to amplify her message. Compare *Meyer*, 486 U.S. at 419. Ohio's law affects only petition circulators who insist on being paid by a particular method. CTR can still use both volunteers and paid circulators, and can still use its money to amplify its message. Even the Sixth Circuit concluded that, unlike the regulation in *Buckley*, "there is little in the record to suggest" that Ohio's business regulation would dissuade "a substantial number of people in Ohio . . . from participating in the petition process." *Citizens for Tax Reform*, 518 F.3d at 385.

Accordingly, because Ohio's law regulates only a business relationship and not speech, Ohio's business regulation does not violate the First Amendment.

b. Banning pay-per-signature fee arrangements does not severely burden CTR's constitutional rights.

Even if the Court concludes that Ohio's law affects constitutionally protected speech, CTR must still show that Ohio's law severely burdens CTR's First Amendment rights. At the summary judgment stage, CTR, however, offered only irrelevant and speculative assertions, while Ohio offered evidence contradicting those assertions.

i. CTR offered only speculative and irrelevant evidence to support its claim.

CTR's relevant constitutional right is the right to spread its message to try to get issues on the ballot. But CTR's "factual" assertions do not lead to the conclusion that Ohio's law threatens that right. Rather, CTR's assertions are all either speculative or, if true, irrelevant to the issue that matters. Indeed the Sixth Circuit even concluded that some of CTR's evidence was "limited" and "inconclusive." *Citizens for Tax Reform*, 518 F.3d at 384.

First, CTR claims that some circulators will refuse to work in Ohio if the per-signature payment ban goes into effect, but that claim is unsubstantiated. CTR's vendor, Arno, made only nonspecific assertions about his view of what "professional circulators" prefer. (See R. 29; CTR's Mot. for Summ. J., Ex. 5, Arno Decl. ¶ 28; J.A. at 303). Only one actual circulator, Gena Ranger, said she would not want to work in Ohio. (R. 43; Ranger's Decl. ¶ 8; J.A. at 842). But that is Ranger's choice.

not a legal restriction. And it very well may be that other circulators would rather be paid by the hour than by the signature.

Second, just as CTR's allegation of a diminished pool of circulators reduces to nothing, so, too, does any claim that the companies in the business will abandon Ohio wholesale. Arno continues to operate in Oregon, and his claim regarding Ohio is not that his company will leave, but that his company will have to renegotiate its contracts. (R. 29; Arno Decl. ¶ 30; J.A. at 303-04).

Third, CTR's allegations of increased costs are speculative. Originally, CTR offered Arno's estimate that CTR's costs would increase from the original fixed contract price of $765,000 ($1.70 per signature for 450,000 signatures) to $1,069,000. (R. 29; Arno Decl. ¶ 21; J.A. at 301). But later, he changed that estimate to $1,500,000. (R. 29; Arno Decl. ¶ 25; J.A. at 302). He offered no data or other details to support the newer, larger figure. He also admitted that he offered no documentation regarding the real costs of any of his three Oregon projects under the hourly payment system, nor did he compare any such data to the signatures collected to compare what those Oregon projects would have cost under a per-signature system. (R. 29; CTR's Mot. for Summ. J., Ex. 6, Arno Depo. at 44; J.A. at 359). In sum, Arno had no factual foundation underlying his increased-costs claim.

Taken as a whole, CTR's evidence of burden is strongly similar to the lack of evidence the plaintiffs proffered in *Crawford*. The *Crawford* plaintiffs attacked Indiana's law with depositions and affidavits of individuals who encountered difficulties

obtaining the required identification cards. *Crawford*, 128 S. Ct. at 1622. The Court concluded, however, that such testimonials did not provide "concrete evidence" that the regulation imposed an "'excessively burdensome requirements'" on voters. *Id.* at 1622-23 (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)). Here, too, CTR's evidence is not concrete and does not show an excessive burden.

ii. The Oregon experience contradicts CTR's assertions that it is severely burdened.

Ohio cannot definitively show what would happen in Ohio with the law in place because it has been enjoined from the start, preventing it from building that record. But Oregon's similar law did go into effect, so that is the best available evidence of what occurs when these statutes are implemented. The Oregon experience shows that ballot access did not decrease significantly.

Oregon saw just one fewer ballot initiative qualify for the ballot in 2004, after the new law, compared to 2002, before the law. (See R. 38; Certified Copy of Oregon Sec. of State's 2002-2004 Final Measure Log; J.A. at 750-54). And the overall validity rate for qualifying measures rose from 69.63% to 72.35%. (*Id.*). Notably, the number of initiatives that were filed, but failed to qualify, went down, from four in 2002 to just one in 2004. (*Id.*). If the law created barriers to signature collection, the number of tried-but-failed issues should have gone up. The decrease, and the concomitant increase in signature validity rates, shows that Oregon was able to remove an incentive to fraud without significantly burdening speech or reducing ballot access.

2. The Sixth Circuit minimized Ohio's interest in preventing election fraud and discounted the evidence Ohio produced.

No one disputes that pay-per-signature fee arrangements induce petition circulators to engage in fraud. Ohio passed Revised Code § 3599.111 to prohibit a payment system that encourages fraud and to protect a key part of the electoral process—the gathering of signatures to place an initiative (or candidate) on the ballot. States may enact such reasonable regulations, as long as those regulations do not impede core political speech or severely burden the ability of those seeking political change to communicate with voters. See *Timmons*, 520 U.S. at 358. And in this case, Ohio's law is amply supported by the legal conclusion that paying circulators by the signature is an incentive to commit two types of fraud: (1) submitting false signatures and (2) misrepresenting the contents of a petition to induce citizens to sign.

a. States are not required to show empirical evidence of fraud.

States need not show "empirical verification" to justify regulations to prevent fraud. *Timmons*, 520 U.S. at 364. In *Timmons*, the Court considered Minnesota's law prohibiting a candidate from appearing on the ballot as the candidate for more than one party. *Id.* at 353. The *Timmons* plaintiffs argued that such a prohibition violated their First Amendment rights, but the Court held that Minnesota's interests in "ballot integrity and political stability," *id.* at 369-70, justified any burden the plaintiffs alleged. Specifically, the State asserted

that the law was supported by the State's interest in preventing voter confusion, promoting candidate competition, preventing electoral distortions, and discouraging party splintering. *Id.* at 364. The Court did not require more of the State than this assertion.

In *Crawford*, the Court followed *Timmons* and did not require "empirical verification" of the State's interest. Indiana justified its voter-identification law as a fraud-prevention regulation even though the record contained "no evidence of any such fraud actually occurring in Indiana in any time in its history." *Crawford*, 128 S. Ct. at 1619. Despite this lack of evidence, the Court upheld the regulation. *Id.* at 1624.

Here however, the Sixth Circuit demanded far more than either *Timmons* or *Crawford* required. Contrary to the Court's precedent, the Sixth Circuit: (1) required Ohio to offer evidence of actual fraud and (2) required Ohio to demonstrate a causal connection between the regulated activity and election fraud.

i. States do not need to suffer the adverse effects of petition fraud before legislating to protect the electoral process.

The *Timmons* approach, not requiring an empirical showing of fraud, makes good sense. Requiring States to prove actual fraud before legislating would mean that States would have to allow their electoral systems to suffer harm before taking corrective action. See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). Accordingly, as

the court in *Munro* explained, States may "respond to potential deficiencies in the electoral process with foresight" and need not wait for harm before legislating. *Id.* at 195.

The Sixth Circuit's approach, however, requires States to suffer harm before legislating. See *Citizens for Tax Reform*, 518 F.3d at 387 (requiring Ohio to demonstrate that "circulators who were paid by signature engaged in fraud in the past"). For example, the court took "judicial notice" of the incentive to inflate the number of signatures when a petition circulator's pay is paid per signature but concluded that whether someone would act on that incentive is an "empirical question" that must be supported by an evidentiary record. *Id.* at 387.[3] To meet the Sixth Circuit's high standards, Ohio must have at least one fraudulently placed candidate or initiative on the ballot to create a suitable record of actual fraud. Moreover, requiring such empirical evidence would lead to "endless court battles" over the evidence a State offers to support its law. *Munro*, 479 U.S. at 195.

The better approach, as *Timmons*, *Munro*, and *Crawford* have recognized, is to permit States to protect their electoral processes ex ante, rather than to force States to pick up the pieces after fraud undermines the fair workings of the political process.

---

[3] Although the Sixth Circuit required "empirical verification" for the common sense notion that pay-per-signature fee arrangements induce fraud, the court allowed CTR to rely on "basic economic theory" to argue that employees paid per hour are less efficient. See *Citizens for Tax Reform*, 518 F.3d at 384.

ii. *Timmons* does not require a State to demonstrate a causal connection between the regulated activity and fraud.

Not only did the Sixth Circuit require empirical evidence of fraud, but it also demanded Ohio to demonstrate a causal connection between election fraud and pay-per-signature fee arrangements. For example, the court recognized instances of fraud relating to the Nader petitions, but concluded that Ohio's evidence of such fraud was insufficient. According to the court, Ohio had to prove a causal connection between the fraud and the petition circulators' receipt of payment per-signature. Because, in the court's opinion, the evidence did not prove that the per-signature feature caused the fraud but instead showed only a correlation, the evidence did not justify Ohio's regulation. *Citizens for Tax Reform*, 518 F.3d at 388.

Contrary to the Sixth Circuit's high evidentiary standards, the State is entitled to reasonable inferences from the evidence presented, and here, the State showed that people paid per signature submitted many false signatures. No more is required. And as a practical matter, it is hard to envision what stronger evidence CTR would have the State supply to firm up the obvious connection between incentive and result.

b. Even though no empirical evidence is required, Ohio put forth evidence documenting fraud.

Even though *Timmons* does not require "empirical verification," Ohio more than showed its need to curtail petition fraud induced by pay-per-signature business arrangements. But the Sixth Circuit ignored or discounted the evidence Ohio offered.

For example, Ohio offered the testimony of a director of an Ohio county board of elections. The director testified that his board referred to the Sheriff's office for investigation a petition circulator who was paid per signature in a 2004 initiative petition drive. (R. 35; Williams Aff. ¶¶ 1-3; J.A. at 600). The circulator's petitions were riddled with signatures designated as "not genuine." (See R. 35; Williams Aff., Exs.; J.A. at 692, 695, 700, 703, 704). Ohio also showed that voter-registration drives in Ohio—which involved payment per signature—had led to criminal investigations. For example, Kevin Dooley, a petition circulator who was paid per-registrant, pleaded guilty for forging a signature. (R. 37; Certified Copy of Indictment; J.A. at 746-49; see http://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/caseSearch for Case No. 04 CR 5764 (last accessed on 7/30/08).

Ohio also offered as evidence the experiences of other States—Oregon, North Dakota, and Montana—with pay-per-signature payments and fraud. Those States' experiences are relevant for the common-sense reason that States' judgments are informed by a national perspective. See *Crawford*,

128 S. Ct. at 1619 (permitting Indiana to rely on examples of fraud in other parts of the country to justify Indiana's voter-identification regulation); cf. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) (permitting City of Erie to rely upon other localities' experience with nude dancing to conclude that nude dancing in Erie would produce harmful "secondary effects").

Finally, and quite tellingly, protests were filed against CTR and its circulators, alleging fraud of several types. The protests asserted that CTR's petitions listed inaccurate and false employer information, that forms included inflated totals of the number of signatures, and that circulators' compensation statements were omitted, false, altered, or interlineated. (R. 44; Reply, Exs.; J.A. at 856-68). These protests were never resolved, because CTR withdrew its petition. But the possibility of fraud shown by those protests—and the attendant public perception of a problem in the process—more than demonstrates why Ohio acted to prevent further abuse. Cf. *Crawford*, 128 S. Ct. at 1620 (recognizing that "public confidence in the integrity of the electoral process" justifies reasonable regulations).

3. Ohio's law is constitutional under the *Timmons* balancing test.

Under the *Timmons* balancing test, the Sixth Circuit should have compared the strong state interests outlined above to the minimal burden on CTR. The Ohio law more than satisfies the test and survives First Amendment challenge. As the Court explained, "States allowing ballot initiatives have considerable leeway to protect the integrity and

reliability of the initiative process," *Buckley*, 525 U.S. at 191, and a "State's 'important regulatory interests' will usually be enough to justify 'reasonable non-discriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434).

Here, preventing fraud and ensuring the integrity of the ballot-initiative process are fundamental state regulatory interests. Ohio's law is a reasonable, measured response to in-state fraud that does not significantly burden CTR or similar groups, as CTR remains able to communicate with voters and qualify issues for the ballot. All that Ohio has done is alter the business model that governs the relationship between CTR and its vendors, not CTR's communications with voters.

CONCLUSION

For all of the above reasons, the Court should grant Ohio's Petition for Certiorari.

Respectfully submitted,

WILLIAM P. MARSHALL
6 Heather Court
Chapel Hill, NC 27517

Special Counsel for the
Attorney General of Ohio

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC MEUTI
KIMBERLY A. OLSON
Deputy Solicitors
SHARON A. JENNINGS
Assistant Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
State of Ohio

August 4, 2008

104

(2)

Supreme Court, U.S.
FILED

08-151 AUG 4 - 2008

OFFICE OF THE CLERK

No. 08-____

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

WILLIAM P. MARSHALL
6 Heather Court
Chapel Hill, NC 27517

Special Counsel for the
Attorney General of Ohio

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC MEUTI
KIMBERLY A. OLSON
Deputy Solicitors
SHARON A. JENNINGS
Assistant Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
State of Ohio

TABLE OF CONTENTS

Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, March 5, 2008 ..... 1a

Appendix B: Order, United States District Court for the Southern District of Ohio, Western Division, November 27, 2006 ..... 28a

Appendix C: Temporary Restraining Order, United States District Court for the Southern District of Ohio, Western Division, April 19, 2005 ..... 50a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 08a0104p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITIZENS FOR TAX REFORM and JEFFREY P. LEDBETTER,
Plaintiffs-Appellees,

v.

JOSEPH DETERS et al.,
Defendants,

STATE OF OHIO,
Intervenor Defendant-Appellant.

No. 07-3031

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 05-00212—Susan J. Dlott, District Judge.

Argued: November 30, 2007

Decided and Filed: March 5, 2008

Before: SILER, GIBBONS, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: William P. Marshall, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellant. David R. Langdon, LANGDON & HARTMAN, Cincinnati, Ohio, for Appellees. **ON BRIEF**: William P. Marshall, Sharon A. Jennings, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellant. David R. Langdon, Curt C. Hartman, LANGDON & HARTMAN, Cincinnati, Ohio, for Appellees. Todd P. Graves, GRAVES, BARTLE & MARCUS, Kansas City, Missouri, for Amicus Curiae.

OPINION

McKEAGUE, Circuit Judge. As with the law in general,[1] the First Amendment is a jealous mistress. It enables the people to exchange ideas (popular and unpopular alike), to assemble with the hope of changing minds, and to alter or preserve how we govern ourselves. But in return, it demands that sometimes seemingly reasonable measures enacted by our governments give way.

The State of Ohio enacted a provision making it a felony to pay anyone for gathering signatures on election-related petitions on any basis other than the time worked. It did so for the sensible purpose of reducing fraudulent signatures. The provision, however, runs afoul of the First Amendment because

---

[1] *See* Joseph Story, *Inaugural Address as Dane Professor of Law at Harvard University, on the Subject of the Value & Importance of Legal Studies* (Aug. 5, 1829).

it creates a significant burden on a core political speech right that is not narrowly tailored. Accordingly, we affirm the district court's grant of summary judgment against the State.

I

The district court set forth the background of this case:

Ohio Revised Code ("O.R.C.") § 3599.111 ("the Statute") states in relevant part as follows:

> (B) No person shall receive compensation on a fee per signature or fee per volume basis for circulating any declaration of candidacy, nominating petition, initiative petition, referendum petition, recall petition, or any other election-related petition that is filed with or transmitted to a board of elections, the office of the secretary of state, or other appropriate public office.
>
> * * *
>
> (D) No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked.

Plaintiffs Citizens for Tax Reform ("CTR") and Jeffrey P. Ledbetter, a former Treasurer of CTR,[2] filed a Verified Complaint on April 1, 2005

---

[2] Collectively referred to herein as "CTR."

challenging the constitutionality of the O.R.C. § 3599.111 on the grounds that the prohibition of payment to petition circulators on a per-signature or per-volume basis violated their core political speech rights. (Doc. 1.) Plaintiffs named as defendants Joseph T. Deters, the Hamilton County, Ohio prosecutor, and Mathias H. Heck, Jr., the Montgomery County, Ohio prosecutor, both in their official capacities only, as persons responsible for the enforcement of the Statute. (*Id.*)

Prior to the effective date of the Statute, CTR had engaged a political consulting firm on the basis of a fixed fee contract to secure the necessary signatures to qualify a proposed constitutional amendment for the November 2005 Ohio general election. Pursuant to the contract, CTR was to pay the firm $1.70 per signature for a total of approximately 450,000 signatures. After the Statute became effective, CTR was not permitted to pay circulators on a per-signature or on any per-volume basis. The political consulting firm was no longer willing to collect signatures pursuant to the agreed-upon fixed-fee contract and it estimated that the cost for gathering the signatures would increase by more than $300,000. Plaintiffs asserted that the Statute increased the cost of qualifying their proposed amendment, made it more difficult to raise money necessary to fund the initiative effort, and that they had refrained from attempting to qualify the proposed amendment for the ballot so long as the Statute was in force. (*Id.*)

The Ohio Attorney General moved to intervene as a defendant in this action on March 11, 2005 in order to defend the constitutionality of § 3599.111 and the Court issued a Notation Order

permitting the intervention on March 12, 2005. (Doc. 7.)

On March 19, 2005, Chief Judge Sandra Beckwith issued a Temporary Restraining Order enjoining the enforcement of O.R.C. § 3599.111. (Doc. 16.) Chief Judge Beckwith found that Plaintiffs "have introduced actual evidence that tends to show that the restriction on payment of petition circulators on a per-signature basis limits their ability to retain effective circulators and reduces the likelihood that they will succeed in placing their initiative on the November 2005 ballot." (*Id.* at 9.) She further found that the State of Ohio did not adduce evidence of the necessity of the law to prevent fraud. She stated that the State's evidence that fraud occurred when circulators were paid on a per-signature basis in Ohio was not sufficient to establish that the per-signature basis was cause of or an incentive to the fraud. (*Id.*) The State had not proven "that compensation on a per-signature basis generates fraud at a greater rate than other forms of compensation." (*Id.*)

On May 4, 2005, March 22, 2006, and April 16, 2006, the Court issued Agreed Orders extending the temporary restraining order until October 15, 2005, extending it to cover the amendments to the law that took effect on May 2, 2005, and extending it pending a final disposition in this case. (Docs. 20, 42, 46.)

Citizens for Tax Reform v. Deters, 462 F. Supp. 2d 827, 828-30 (S.D. Ohio 2006) ("*CTR*") (footnotes in original omitted).

Deters and Heck moved for summary judgment based on the intervention in the case by

the State of Ohio. As CTR did not oppose the motion, the district court granted them summary judgment and dismissed them from the case. *Id.* at 830.

CTR and the State of Ohio filed cross motions for summary judgment. The State also filed a motion to dismiss based on mootness. The district court denied the State's motion to dismiss, concluding that the State had not proven that CTR had disbanded and, even if it had, CTR's case was saved from mootness under the exception for wrongs that are "capable of repetition, yet evading review." *Citizens for Tax Reform* v. Deters, No. 05-212, 2006 WL 3420242, at *1 (S.D. Ohio Nov. 27, 2006).

On the cross motions, the district court held that the Statute was unconstitutional. The district court found that CTR had established that the "Statute burdens their core political speech rights." *CTR*, 462 F. Supp. 2d at 832. Specifically, it agreed with a prior district court judge's issuance of a temporary restraining order in the case based on CTR's showing "that the Statute limits [its] ability to retain effective circulators and reduces the likelihood that petition proponents will be able to place their petitions on the ballot." *Id.* The State countered that the Statute was justified as a means to combat irregularities and fraud in the election process. The district court dismissed much of the State's evidence, however, as inconclusive or irrelevant. It concluded, "[W]hile the State of Ohio's evidence might show that fraud has occurred when the payment per-signature method is used, it has not isolated the form of payment as being the cause of or an incentive to wide spread petition signature fraud in Ohio." *Id.* at 838.

The State timely appealed the district court's denial of its motion for summary judgment.

II

A. Fed. R. Civ. P. 56

The court reviews de novo the district court's grant of summary judgment. *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 619 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 2100 (2007). Summary judgment should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To survive summary judgment, the non-movant must provide evidence beyond the pleadings "set[ting] out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

B. Balancing First Amendment Rights Against the Regulation of Elections

1. In General

The First Amendment to the U.S. Constitution reads in part, "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment extends these prohibitions against the States. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). One of the main interests embodied in the First Amendment is that of a free, sovereign people using the power of persuasion, rather than force, to govern itself. Accordingly, the Supreme

Court has held that the First Amendment places a high value on the right to engage freely "in discussions concerning the need for [political] change," including change accomplished through petitions and elections. *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

First Amendment rights to free speech, to assemble, and to petition the government are not, of course, without boundary. With respect to elections, Article I, Section 4 of the Constitution grants to States the authority to determine "The Times, Places and Manner of holding Elections." As the Supreme Court explained in T*immons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), "[I]t is . . . clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder," *id.* at 358 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." (internal quotation marks omitted))). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional L. Found.*, 525 U.S. 182, 191 (1999) (citations omitted). When the boundaries of First Amendment rights push up against a State's authority to regulate elections, cases like the present one arise.

CTR asserts that Ohio's requirement that circulators be paid only on the basis of their time worked (the "per-time-only" requirement) places a severe burden on its First Amendment rights. The

State counters that the burden is not severe and, even if it is, the burden is justified by the need to counter election fraud. In Timmons, the Supreme Court set forth the following framework for resolving these types of competing interests:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

520 U.S. at 358-59 (internal quotation marks and citations omitted); *see also Buckley*, 525 U.S. at 192 ("We have several times said no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." (internal quotation marks omitted)).

2. Character and Magnitude of the Burden

a. Prior Decisions

The State of Ohio argues that its per-time-only requirement imposes, at most, only a moderate burden on CTR's rights. It faults CTR for failing to show, in the State's words, that the ban would cause "a significant, quantitative decrease in the number of circulators available" or that it "would decrease the number of issues successfully placed on the ballot." Appellant's Br. at 18. It asserts that we should apply a "less exacting review" and that, under this review, the requirement meets the standard for a "reasonable, nondiscriminatory restriction[]." *Timmons*, 520 U.S. at 358. CTR argues, on the other hand, that the cumulative effect of the Statute on the petition process severely burdens CTR's core political speech rights.

The Supreme Court first addressed the issue of payment to petition circulators in *Meyer v. Grant*. The State of Colorado had banned proponents of petitions from paying circulators, among other restrictions. The Court subjected Colorado's payment ban to "exacting scrutiny." *Meyer*, 486 U.S. at 420 (citations omitted). The Court determined that the ban restricted political expression in two fundamental ways: (1) it "limit[ed] the number of voices who will convey [the petitioner's] message and the hours they can speak and, therefore, limits the size of the audience they can reach"; and (2) "it makes it less likely that [the petitioner] will garner the number of signatures necessary to place the matter on the ballot, thus limiting [the petitioner's]

ability to make the matter the focus of the statewide discussion." *Id.* at 422-23.

The State of Colorado defended the measure in part by pointing out all of the other avenues of expression left open to petitioners. The Court rejected the argument, explaining that simply because more-burdensome avenues of speech existed did not mean that Colorado could simply shut down a less-burdensome one: "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424. The Court concluded that the burden Colorado had to overcome to justify its ban was "well-nigh insurmountable." *Id.* at 425.

Several years later the State of Colorado was again before the Supreme Court to justify several new petition regulations. In *Buckley v. American Constitutional Law Foundation*, the Court looked at three provisions: "(1) the requirement that initiative-petition circulators be registered voters"; "(2) the requirement that they wear an identification badge"; and "(3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator." 525 U.S. at 186. Using again the "exacting scrutiny" it applied in *Meyer*, *id.* at 204, the Court struck down all three as too heavy a burden in comparison to the State's purported justifications of deterring fraud and corruption, *id.* at 205.

Since the *Meyer* and *Buckley* decisions, three circuits have considered whether bans on per-signature payments meet constitutional muster. The Eighth Circuit was the first when it considered

North Dakota's ban in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) ("*IRI*"). The court found the ban constitutional. It based its holding on the respective strengths of the proofs submitted:

> Examining the record in this case, we conclude that the State has produced sufficient evidence that the regulation is necessary to insure the integrity of the initiative process. In 1987, the Legislature passed § 16.1-01-12(11) in response to problems that occurred with an initiative that had been placed on the ballot in November 1986. State Representative Linderman stated, in regard to a 1986 signature campaign, that "students were being paid 25¢/signature. There were reported irregularities-taking names out of the phone book, etc." The limited legislative history available shows that the legislators were aware of, and contemplated, the bill's effect on the circulation of petitions, but that they were more concerned with the testimony they had heard regarding signature fraud.
>
> Furthermore, as mentioned in the previous section on the residency requirement, in 1994 approximately 17,000 petition signatures were invalidated. A subsequent investigation revealed that payment per signature was an issue in the 1994 incident.

> The appellants have produced no evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures. The appellants have only offered bare assertions on this point. While it may be argued that such assertions may establish an unacceptable burden on signature-gathering where the state cannot offer any evidence demonstrating the need to prohibit commission payments, *Cf. Meyer*, 486 U.S. at 424, 426, 108 S.Ct. 1886, when the state introduces evidence justifying the ban on commission payments as a necessary means to prevent fraud and abuse (as the state has in this case), initiative sponsors may not rest on bare assertions alone.

Id. at 618.

The Ninth Circuit addressed a similar per-signature ban passed by Oregon voters in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006). After an abbreviated bench trial, the district court held that Oregon's ban did not unconstitutionally burden petitioners' core political speech rights. *Id.* at 953. The Ninth Circuit affirmed. After reviewing the standard set forth by the Supreme Court in Meyer and Buckley, the court distinguished Oregon's per-signature ban from the total ban on payments in *Meyer*. *Id.* at 962. It described Oregon's ban as simply "prohibit[ing] one method of payment." *Id.* It also read *Buckley* as modifying *Meyer*:

> To the extent *Meyer* may be read to indicate that any resulting decrease in the pool of available circulators is sufficient to constitute a "severe burden" under the First Amendment, in *Buckley* the Court refined its analysis and made clear that the *degree* of the decrease resulting from the measure is properly considered in determining the severity of the burden.

Id. at 962-63 (citation omitted, emphasis in original). The court found that the district court did not clearly err in rejecting the petitioner's evidence of circulators leaving or refusing to work in Oregon as "unsupported speculation." *Id.* at 964. The two primary affiants, William Arno of Arno Political Consultants ("APC") and Tracy Taylor of Taylor Petition Management, LLC, had little experience in Oregon, and thus could not offer a reliable estimate of the ban's effect on the cost of signature gathering in the state. *Id.* at 965. Likewise, their assertions regarding the effect the ban had on the validity rate of signatures carried little weight with the court. *Id.* at 966.

The court recognized that "from an economic perspective, eliminating one method of payment (but not every method, a la *Meyer*) for petition circulators could result in some barriers to entry in the signature procurement market." *Id.* at 967. Paying circulators by the signature "can be more productive of signatures than paying an hourly wage." *Id.* The court noted, however, that whether the measure actually created any barriers to entry was "a question of historical fact," and it did not find clear error with the district court's determination that no

such barriers existed. *Id.* Even had the petitioners made the requisite showing, the barriers would have established only a "lesser burden" under the First Amendment. *Id.* at 968. This is because Oregon's ban was "quite limited in its proscription, barring only payment of petition circulators on the basis of the number of signatures gathered. It does not prohibit adjusting salaries or paying bonuses according to validity rates or productivity . . . which could likely counter any barriers to entry." *Id.* Thus, concluding that the petitioners had established only a "lesser burden" on their rights, the court subjected the per-signature ban to a "less exacting review" and ultimately upheld the ban. *Id.*

Finally, the Second Circuit followed the Eighth and Ninth Circuits in rejecting a petitioner's claim that a per-signature ban violated the Constitution. In *Person v. New York State Board of Elections*, 467 F.3d 141 (2d Cir. 2006), the court joined its two sister circuits in "find[ing] the record presented to [it] provides insufficient support for a claim that the ban . . . is akin to the complete prohibition on paying petition circulators" as in *Meyer* "or that the alternative methods of payment it leaves available are insufficient," *id.* at 143 (citations omitted). The court concluded that the petitioner's argument that paying circulators on a per-signature basis was the best economic incentive was insufficient to show an unconstitutional burden "when balanced against the state's interest in preventing fraud in the gathering of signatures." *Id.*

Several guide posts can be gleaned from these Supreme Court and circuit court decisions regarding the character and magnitude of the burden created by Ohio's per-time-only requirement. First, the

question is fact-intensive, given the "sliding scale" analysis outlined by the Supreme Court in *Meyer*, *Buckley* and other decisions. *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006) (describing the Supreme Court's flexible approach in similar First Amendment cases as a "sliding scale"). Bans on paying circulators, whether outright or partial, can impact political expression in at least three related but distinct ways: (1) a ban can reduce the number and hours of voices which will convey the message; (2) it can limit the size of the audience of the petition; and (3) it can lower the likelihood that a measure will qualify for the statewide ballot. A circulator plays a crucial role in the petition process because the circulator both has to express the petitioner's desire for political change and has to discuss the merits of the proposed change. Finally, although the availability of other payment methods might reduce the burden, the extent to which the more effective means are foreclosed is an important consideration.

b. Character and Magnitude of Ohio's Per-Time-Only Requirement

A review of the record evidence shows that Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive, primarily because of the inefficiencies inherent in a per-time-only system. The evidence also shows that so-called professional circulators would likely not work under a per-time-only system (or at least would choose a per-signature system if given the option). The evidence is mixed on how validity rates are affected. Moreover, CTR has not pointed to any evidence showing that, outside a relatively small number of professional circulators, there exists a substantial

number of people or a demonstrable percentage of Ohio's population who would participate under a per-signature system but not under a per-time-only system.

There is little dispute that operating under a per-time-only system will increase the costs of both proposing an initiative and qualifying it for the ballot. First, the ban eliminates the opportunity for a petitioner to enter into a fixed-price contract with a political consulting firm, signature coordinator, or circulator. Under a per-signature payment scheme, CTR can contract, for example, for 500,000 signatures at a fixed price of $1.50 per signature. The petitioner knows how much money it will need to raise at the outset to qualify its initiative. Under Ohio's per-time-only provision, however, the petitioner cannot enter into a fixed price contract to pay circulators per signature. O.R.C. § 3599.111. Moreover, § 3599.111 does not define the term "person." Section 1.59(C) of the Ohio criminal code states: "As used in any statute, . . . 'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association." Thus, a petitioner is prohibited from paying a political consulting firm, signature coordinating firm, or any other business entity to gather a specific number of signatures for a fixed price. In other words, the ban works up and down the chain from petitioner to consulting firm to signature coordinating firm to circulator. Thus, the per-time-only provision adds an element of risk to the petition process which would otherwise be absent.

In addition to the increased risk, petitioners get fewer signatures for their money, according to CTR. Per-hour circulators are less efficient at

gathering signatures than are per-signature circulators. The cause for this drop in efficiency is hardly novel: basic economic theory instructs that a producer will seek to maximize the output for which she gets paid until the cost to her of producing another marginal unit equals the payment she receives for it. Under the per-time-only provision, the output for which the circulator is to get paid would not be signatures, but rather time worked. Thus, the circulator would have an incentive to work as many hours as possible up to the point the wage earned for the marginal unit of time equaled the marginal cost to her of working that unit of time. The circulator's primary focus would be on the amount of time worked, not the quality of work product produced.

CTR further asserts that the best, most professional coordinators and circulators are not interested in working under a per-time-only system. They purportedly can earn more money working on a per-signature basis than they can under any other system. Tracy Taylor testified that his top coordinators that qualified his last two Ohio issues refuse to go to Ohio on an hourly basis. This reluctance on the part of some professional coordinators and circulators also makes economic sense. If, for example, the professional circulators are more efficient than the average circulator in the sense that they can gather more valid signatures within a given unit of time, they will be financially better off working under a system that rewards them based on their efficiency, rather than a system which pays them based on something for which they do not have a comparative advantage, quantity of time worked.

According to CTR, the cumulative effect of the inefficiencies caused by a per-time-only system increases the amount of time it takes to collect signatures, further exacerbating the risk of unforeseen costs. As a result, CTR contends that it and other firms are not only less likely to qualify their proposed initiatives for the ballot, but are less likely even to try. The State counters by pointing to the relatively stable numbers of qualifying petitions in Oregon before and after it enacted its per-signature ban in 2002. The Oregon numbers suffer, however, from a similar defect in Colorado's experience that the Supreme Court pointed out in *Meyer*: the statistic "does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that [petitioners] would have had greater success if they had been able to hire extra help." 486 U.S. at 418 n.3.

CTR has also presented evidence that circulators paid by the time worked yield lower validity rates than circulators paid by the signature. The evidence is limited, however, and inconclusive. For example, Michael Arno stated in a declaration that his company's validity rates dropped in all three of its petition drives it handled in Oregon after the per-signature ban went into effect in that state. Lee Albright, the owner of a petition management company, testified that his firm collected signatures for an initiative in Oregon after the ban. His firm ended up collecting twice the number of signatures needed to get the initiative on the ballot because he was afraid that the amateur petition circulators would collect too many invalid signatures. However, Ohio has submitted evidence from Oregon's Secretary of State that the average validity rate on

petitions actually increased from 69.63% in 2002 to 72.35% in 2004. At best, CTR has raised a question of fact whether validity rates are lower under a per-time-only scheme.

Finally, there is little in the record to suggest that a substantial number of people in Ohio would be dissuaded from participating in the petition process because of a ban on all payment not based on time worked. This is not a case like in *Buckley* where approximately 35% of the state's population was categorically prohibited from participating. 525 U.S. at 193-94 & n.15. Nor has CTR proffered, for example, a broad-based survey to show a demonstrable decrease in the pool of potential circulators.

Accordingly, a review of the record confirms that there is no genuine issue of material fact (1) that Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive; and (2) that professional coordinators and circulators would likely not work under a per-time-only system. As to the validity rates and the available statewide pool of circulators, however, the matters are at best issues of fact.

c. Where Does § 3599.111 Fit Along the Sliding Scale?

If the Supreme Court's decision in *Meyer* lies at one end of the spectrum and the *IRI*, *Prete* and *Person* decisions lie at the other, then this case falls somewhere in between. Ohio's partial ban on payment is not as draconian as the complete ban in *Meyer*. However, it has a couple of features that

distinguish it from those considered in the other circuit court decisions.

One difference between the present case and *IRI*, *Prete* and *Person* is that Ohio's ban is more restrictive. North Dakota, Oregon and New York all banned payments made on a per-signature basis; Ohio, on the other hand, has banned all remuneration to circulators except on a per-time basis. The difference is not academic. As the Ninth Circuit recognized in *Prete*, Oregon's ban on per-signature payments left open various other means of payment besides one based solely on the time worked:

> Allowable practices include: paying an hourly wage or salary, establishing either express or implied minimum signature requirements for circulators, terminating circulators who do not meet the productivity requirements, adjusting salaries prospectively relative to a circulator's productivity, and paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis.

Prete, 438 F.3d at 952 n.1 (quoting Or. Admin. R. 165-014-0260); *see also Person*, 467 F.3d at 143 (noting that New York's statute "specifically prohibits only the per-signature payment to election workers"); *IRI*, 241 F.3d at 616 (reviewing North Dakota's provision which prohibits payment "on a basis related to the number of signatures obtained").

This is a significant distinction. Under a plain reading of § 3599.111, CTR (or its subcontractors) could not give a bonus to a circulator based on productivity or longevity. CTR could not set a minimum signature requirement because, in order to earn a day's wages, for example, a circulator would both have to work a certain number of hours and have to collect a certain number of signatures, thereby partially tying earnings to the number of signatures. Arguably, CTR could not terminate a circulator who consistently did not collect enough signatures because, again, to earn a wage (and keep the job) the circulator would, among other things, have to collect a minimum number of signatures. Furthermore, CTR could not base a circulator's earnings on the geographic area covered (pay per city block, for example). It is even unclear whether CTR could pay a salary to a circulator unless it strictly limited the hours worked. If, instead, a salaried circulator were responsible for completing a number of duties each day or week regardless of the number of hours worked (i.e., the typical plight of the salaried worker), then in a sense the circulator would be compensated on a basis other than strictly time worked. This added difficulty with motivating a workforce reinforces CTR's argument that proposing and qualifying initiatives would be significantly more expensive under § 3599.111.

Another difference between § 3599.111 and the other state provisions is the penalty for a violation. The New York provision makes a violation a misdemeanor punishable by up to one year of imprisonment, a fine of $100 to $500, or both. *Person*, 467 F.3d at 143 (citing N.Y. Elec. L. § 17-122(1), violation of which is a misdemeanor); N.Y. Elec. L. § 17-166 (stating that penalty for any such

misdemeanor violation). Similarly, the North Dakota provision makes a violation a misdemeanor punishable by up to one year of imprisonment, a fine up to $2,000, or both. *IRI*, 241 F.3d at 616 (citing N.D. Cent. Code § 16.1-01-12(11), violation of which is a class A misdemeanor); N.D. Cent. Code § 12.1-32-01(5) (describing the penalty for a class A misdemeanor). Violation of the Oregon provision is punishable by a minimum of a $100 civil fine. *Prete*, 438 F.3d at 952 n.1. In contrast, anyone who was to violate § 3599.111 would be guilty of a felony punishable by imprisonment between six and twelve months, a fine up to $2,500, or both. O.R.C. § 3599.111(E) (stating that violation of the Ohio provision constitutes a felony of the fifth degree); O.R.C. § 2929.14(A)(5) (describing the penalty for a felony of the fifth degree).

With the broader ban on the types of payment and harsher criminal sanctions for violations, Ohio's provision lies closer to the complete ban in *Meyer* than the partial bans in the other circuit court cases.[3] As the Supreme Court explained in *Meyer*, "The First Amendment protects [petitioners'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." 486 U.S. at 424. While petitioners are not

---

[3] We take no position on the hypothetical question of whether, if Ohio were to enact a partial ban similar to Oregon's, North Dakota's or New York's, that partial ban would be subject to the less exacting review of *Timmons*. The constitutional analysis is, as we have noted, fact- and context-intensive. There may be significant differences between how Ohio and those other States govern and operate their respective petition drives and elections which would make even a lesser ban in Ohio subject to the more exacting scrutiny of *Meyer*. But, again, as the question is not before us, we will address the matter no further.

constitutionally guaranteed an endless variety of means, when their means are limited to volunteers and to paid hourly workers who cannot be rewarded for being productive and arguably cannot be punished for being unproductive, they carry a significant burden in exercising their right to core political speech.

3. The State's Interest in Eliminating Fraud

When a State places a severe or significant burden on a core political right, like here, it faces a "well-nigh insurmountable" obstacle to justify it. *Meyer*, 486 U.S. at 425; *cf. Buckley*, 525 U.S. at 192 n.12. The provision must be narrowly tailored and advance a compelling state interest. *Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 423-24. Although a State need not present "elaborate, empirical verification" of the weight of its purported justification when the burden is moderate, see Timmons, 520 U.S. at 364, it must come forward with compelling evidence when the burden is higher, *see Buckley*, 525 U.S. at 203-04; *Meyer*, 486 U.S. at 425-28.

While eliminating election fraud is certainly a compelling state interest, § 3599.111 is not narrowly drawn. First, there is no evidence in the record that most, many, or even more than a de minimis number of circulators who were paid by signature engaged in fraud in the past. The State points primarily to the 2004 presidential election, when circulators trying to get Ralph Nader on the ballot engaged in fraud. The circulators were paid on a per-signature basis. *CTR*, 462 F. Supp. 2d at 834. While this is evidence that circulators who were paid per-signature engaged in

fraud, it does not prove that the per-signature feature actually caused or significantly contributed to the circulators' fraudulent acts. At most, the evidence of fraud associated with the Nader election effort and other elections is evidence of correlation, not causation.

Of course, just as CTR argues that per-signature payment creates a better incentive for hard, efficient work and valid signatures, it cannot escape the flip-side of the argument: the payment also creates an economic incentive to engage in fraud by padding signatures (whether by forgery, false certification or false pretense). Just as the Supreme Court took judicial notice in *Meyer* that "it is often more difficult to get people to work without compensation than it is to get them to work for pay," 486 U.S. at 423, we can take judicial notice that there is an incentive to inflate the measure of output when payment is directly tied to that output. If a person gets paid by the hour, there is an incentive to pad hours; if a person gets paid by the signature, there is an incentive to pad sig atures.

That is not to say, of course, that someone faced with the incentive to pad signatures will actually act upon it. That is an empirical question, one for which there is little in the record to answer. The State has not, for example, pointed to evidence from Oregon suggesting a marked decrease in the level of election fraud since its per-signature ban was enacted. While there is some evidence that validity rates have increased, *see supra*, there are many non-fraudulent reasons why signatures are rejected (e.g., insufficient information about the signer, illegible handwriting). The State's correlation evidence is relevant, if only circumstantial, evidence, but it is a

far cry from showing that the provision is narrowly tailored (or even reasonably tailored) to the State's legitimate interest in reducing election fraud. As explained in *Meyer*, courts should not be "prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." 486 U.S. at 426.

Moreover, Ohio already has criminalized election fraud, specifically with regard to false signatures. *See* O.R.C. § 3599.28 (making false signatures on election-related documents a felony of the fifth degree). This and other criminal provisions of Ohio election law are the types of protections that the Supreme Court has found "adequate" to deter improper conduct with regard to petition circulation, "especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Meyer*, 486 U.S. at 427 (citations omitted).

Accordingly, under the exacting scrutiny of *Meyer* and *Buckley*, Ohio's per-time-only requirement is not sufficiently tied to its otherwise legitimate interest.

III

The State of Ohio argues in large measure that CTR's evidence of increased costs establishes not a free-speech problem, but a business problem. Yet, the State largely misses the point that free speech can be costly. By making speech more costly,

the State is virtually guaranteeing that there will be less of it. Because its ban on all forms of payment to circulators except based on the amount of time worked would create a significant burden on CTR's and other petitioners' core political speech rights, the State must justify it with a compelling interest and narrowly tailored means. It fails to raise a genuine issue of material fact that § 3599.111 is narrowly tailored. Therefore, we **AFFIRM** summary judgment in favor of CTR.

APPENDIX B

ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Citizens for Tax Reform, et al.,

Plaintiffs,

v.

Joseph T. Deters, et al.,

Defendants.

Case No. 1:05-CV-212
District Judge Susan J. Dlott

ORDER

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment (doc. 29), the State of Ohio's Motion for Summary Judgment (doc. 33), Defendant Joseph T. Deters' Motion for Summary Judgment (doc. 32), and Defendant Mathias H. Heck, Jr.'s Motion for Summary Judgment (doc. 34). For the reasons that follow, Plaintiffs' Motion, Deters' Motion, and Heck's Motion are **GRANTED**, and the State of Ohio's Motion is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ohio Revised Code ("O.R.C.") § 3599.111 ("the Statute") states in relevant part as follows:

> (B) No person shall receive compensation on a fee per signature or fee per volume basis for circulating any declaration of candidacy, nominating petition, initiative petition, referendum petition, recall petition, or any other election-related petition that is filed with or transmitted to a board of elections, the office of the secretary of state, or other appropriate public office. * * *
>
> (D) No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked.

O.R.C. § 3599.111.

Plaintiffs Citizens for Tax Reform ("CTR") and Jeffrey P. Ledbetter, a former Treasurer of CTR, filed a Verified Complaint on April 1, 2005 challenging the constitutionality of the O.R.C. § 3599.111 on the grounds that the prohibition of payment to petition circulators on a per-signature or per-volume basis violated their core political speech rights. (Doc. 1.) Plaintiffs named as defendants Joseph T. Deters, the Hamilton County, Ohio prosecutor, and Mathias H. Heck, Jr., the Montgomery County, Ohio prosecutor, both in their official capacities only, as persons responsible for the enforcement of the Statute. (Id.)

Prior to the effective date of the Statute, CTR had engaged a political consulting firm on the basis of a fixed fee contract to secure the necessary

signatures to qualify a proposed constitutional amendment for the November 2005 Ohio general election. Pursuant to the contract, CTR was to pay the firm $1.70 per signature for a total of approximately 450,000 signatures. After the Statute became effective, CTR was not permitted to pay circulators on a per-signature or on any per-volume basis. The political consulting firm was no longer willing to collect signatures pursuant to the agreed-upon fixed-fee contract and it estimated that the cost for gathering the signatures would increase by more than $300,000. Plaintiffs asserted that the Statute increased the cost of qualifying their proposed amendment, made it more difficult to raise money necessary to fund the initiative effort, and that they had refrained from attempting to qualify the proposed amendment for the ballot so long as the Statute was in force. (Id.)

The Ohio Attorney General moved to intervene as a defendant in this action on March 11, 2005 in order to defend the constitutionality of § 3599.111 and the Court issued a Notation Order permitting the intervention on March 12, 2005. (Doc. 7.)

On March 19, 2005, Chief Judge Sandra Beckwith issued a Temporary Restraining Order enjoining the enforcement of O.R.C. § 3599.111. (Doc. 16.) Chief Judge Beckwith found that Plaintiffs "have introduced actual evidence that tends to show that the restriction on payment of petition circulators on a per-signature basis limits their ability to retain effective circulators and reduces the likelihood that they will succeed in placing their initiative on the November 2005 ballot." (Id. at 9.) She further found that the State of Ohio did not

adduce evidence of the necessity of the law to prevent fraud. She stated that the State's evidence that fraud occurred when circulators were paid on a per-signature basis in Ohio was not sufficient to establish that the per-signature basis was cause of or an incentive to the fraud. (Id.) The State had not proven "that compensation on a per-signature basis generates fraud at a greater rate than other forms of compensation." (Id.)

On May 4, 2005, March 22, 2006, and April 16, 2006, the Court issued Agreed Orders extending the temporary restraining order until October 15, 2005,[1] extending it to cover the amendments to the law that took effect on May 2, 2005,[2] and extending it pending a final disposition in this case. (Docs. 20, 42, 46.)

II. ANALYSIS

A. Defendants Deters' and Heck's Motions for Summary Judgment

Defendants Deters and Heck move for summary judgment on the basis that the State of Ohio has intervened to defend the State of Ohio Statute. Defendants also admit that they will be bound by an adverse ruling against the State of Ohio as to the validity of the Statute. Plaintiffs have presented no argument or evidence suggesting that the county prosecutors are necessary to a complete

---

[1] The Court originally issued a Temporary Restraining Order and then extended that TRO. For reasons not clear in the record, the TRO is referred to as a preliminary injunction in CM/ECF document numbers 42 and 46.

[2] The amendments primarily concerned the punitive provisions of the law and are not relevant to the constitutional issues before the Court.

and final adjudication of this matter. Accordingly, Deters' and Heck's Motions for Summary Judgment are **GRANTED**.

B. Plaintiffs' and the State of Ohio's Cross-Motions for Summary Judgment

Plaintiffs have moved for summary judgment seeking a declaration that the Statute is unconstitutional and an order enjoining enforcement of the Statute. The State of Ohio has filed a cross-motion for summary judgment.

"Petition circulation is core political speech because it involves interactive communication concerning political change." Buckley v. American Const. Law Found., Inc., 525 U.S. 182, 186 (1999) (citation omitted). It "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." Meyer v. Grant, 486 U.S. 414, 421 (1988). Petition circulators must convince the signators that the subject matter of the petition "is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate." Id.

Analysis of the particular restriction at hand, the prohibition of a per-signature payment scheme, must first begin with the recognition that the Ohio General Assembly could not have acted to prohibit all forms of payment to petition circulators. The United States Supreme Court declared in 1988 that a Colorado statute that prohibited payment to petition circulators was an infringement of rights of political speech guaranteed by the First Amendment. Id. at 422-24. The Court held that the prohibition restricted core political speech because it "limits the

number of voices who will convey [the political] message and the hours they can speak and, therefore, limits the size of the audience they can reach" and second it "makes it less likely that [the proponents of the amendment] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Id. at 423.

The Supreme Court stated that petition/initiative proponents had a "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." Id. at 424. The Court considered the State of Colorado's expressed justifications for the restriction of a protected right, including the protection of the integrity of the initiative process. Id. at 425. The Court concluded, however, that Colorado had "failed to demonstrate that it is necessary to burden [the amendment proponents'] ability to communicate their message in order to meet its concerns." Id. at 426. The Supreme Court noted the State of Colorado offered no evidence to support its theory that the prohibition was necessary to eliminate the temptation to "accept false signatures" and the Court stated that it was unprepared to assume that a "professional circulator--whose qualifications for similar future assignments may well depend on a reputation for competence and integrity--is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." Id. The Meyer Court expressed that it was persuaded by the existence of Colorado laws creating criminal penalties for forging a signature on a petition, making false or misleading statements relating to a petition, or paying someone to sign a petition. See id.

at 427. The Court stated that those "provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." Id.

Following Meyer, the Supreme Court had another opportunity to set forth the standard by which to evaluate the constitutionality of different types of election laws. The Supreme Court set forth a sliding scale test as follows:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997) (internal quotations and citations omitted) (deciding that a state law forbidding a single person from being listed as the candidate for more than one political party was constitutional).

Finally, the Supreme Court addressed three different conditions Colorado had placed on the ballot-initiative process by law: (1) a requirement that petition circulators be registered voters; (2) a

requirement that circulators wear an identification badge; and (3) a requirement that initiative proponents report the name and address of all paid circulators and the amount paid to each circulator. Buckley, 525 U.S. at 186. After stating that petition circulation is core political speech, the Supreme Court explained that "'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'" Id. at 192. The Court cited Timmons and then reviewed each restriction. It did not however, specify whether each restriction was a severe burden on speech necessitating strict scrutiny or a lesser burden justifiable by a reasonable, nondiscriminatory reason. See id. at 193; id. at 206 (Thomas, J. concurring). The Court ultimately struck down each of the three restrictions. It found as to the registered voter requirement and the name badge requirement that both discouraged participation in the petition circulation process, which limited the number of voices who could carry the petitioner's message and cut down the size of the audience they could reach, and found that Colorado failed to justify that burden. Id. at 194-95, 200.

Based on these Supreme Court precedents, the Court must determine whether the Statute burdens First Amendment rights and whether the State's interest in preventing fraud justifies the burden on speech. The State contends that the Statute is only a lesser burden on speech subject to less exacting review under Timmons. Plaintiffs, on the other hand, contend that the Statute is a burden on core political rights under Meyer and that the Statute should be subject to strict scrutiny analysis.

The Court finds that Plaintiffs have established with evidence that the Ohio Statute burdens their core political speech rights. As Chief Judge Beckwith found in Temporary Restraining Order, Plaintiffs have introduced actual evidence that tends to show that the Statute limits their ability to retain effective circulators and reduces the likelihood that petition proponents will be able to place their petitions on the ballot. For example, prior to the enactment of the Statute, CTR retained Arno Political Consulting ("Arno PC") to obtain 450,000 signatures to place the so-called "TEL Amendment" on the ballot at the cost of $1.70 per signature for a total of $765,000. CTR had determined, based on its work on a previous ballot initiative, that it would not be able to gather the number of necessary signatures without engaging professional circulators. After the Statute was passed, Arno PC indicated that it would have to be paid on a "time and materials" basis, requiring a monthly management fee of $45,000 plus costs, and estimated that its total fee would exceed $1 Million. Plaintiff Ledbetter stated in his affidavit that CTR would not have been able hire Arno PC on a time and materials contract, and thus would not have been able to pursue its goal of placing the TEL Amendment on the ballot, if the Statute had not been enjoined in this litigation. In fact, CTR eventually paid Arno PC $846,346.70 for the collection of 497,851 signatures pursuant to the fixed-price contract. With the benefit of hindsight, and believing that it would have had to hire employee supervisors to manage circulators who worked in the more rural counties in Ohio, Arno PC would have charged CTR approximately $1.5 Million to collect the signatures on a cost and materials basis.

Likewise, Lee Albright, the President of National Petition Management, another consulting firm who has successfully qualified four measures for the ballot in Ohio prior to enactment of the Statute, estimated that it would cost 60% more to qualify ballot measures in Ohio if the Statute was enforced. Additionally, Michael Arno, President of Arno PC, stated that his firm had difficulty hiring the more experienced and trustworthy circulators to work in the State of Oregon after it prohibited per-signature payments, and he believed the same problem would arise in Ohio if the Statute is enforced. Arno also stated his opinion that circulators paid per-signature "are much more careful and diligent about collecting signatures [than circulators paid by time worked] in part because circulators are 'selling' each signature . . . and [political consulting firms] will not 'buy' a signature it deems questionable." (Arno Decl. ¶ 33.) Tracy Taylor, who runs Taylor Petition Management, a mid-level firm that recruits and hires the circulators, testified that firms can control quality better under a per-signature payment scheme because they only pay circulators for signatures that appear to be valid. Taylor has worked under both the per-signature payment schemes and time-based payment schemes and testified that qualifying initiatives took more time and cost more money under the time-based schemes. Taylor also testified that he had trouble retaining the top coordinators who had worked on prior Ohio initiatives to work on the TEL Amendment because of the hourly pay system in place before the Statute was enjoined.

Gena Ranger supports Arno's and Taylor's testimony. Ranger states in her declaration that she is a professional circulator who has worked in more than a dozen states and has worked in Ohio for five

statewide petition efforts in 2003, 2004 and 2005. Ranger refused a request by Taylor Petition Management to participate in a petition drive in Ohio in 2005 after being told she would be paid by the hour. She also refuses to participate in petition drives in Oregon (where she had previously worked before a per-signature prohibition was passed) or in other states where per-signature payment is prohibited. She stated that she believes she can make more money "being paid on a per-signature basis working on petition efforts in states that do not Prohibit per-signature payment."

The State challenges the Plaintiffs' evidence delineated above as proving at most a financial disincentive, not a political speech impediment. The State also asserts that the experience in Oregon after Oregon prohibited per-signature payments to circulators, establishes that such laws impose only a lesser burden on speech. Certified results from the Secretary of State of Oregon demonstrate that seven election measures qualified for the ballot in Oregon in 2002, before Oregon prohibited per-signature payments, and six measures qualified in 2004, after the prohibition was passed. Moreover, the signature validity rate increased from 67.92% in 2002 to 72.35% in 2004 after the prohibition was passed.

The Court questions the probative value of this limited data from Oregon. Without more data and without a more sophisticated analysis, the Court cannot determine whether factors apart from the change in payment scheme might have impacted the 2002 results or the 2004 results. Further, the Court questions this limited data, and to some degree questions any testimony, equating the Oregon initiative experience to the Ohio initiative experience

because it is not an apples to apples comparison. The laws in the two states have fundamental differences. The Ohio Statute permits payments only if made on the basis of time worked. O.R.C. § 3599.111. The Oregon Constitution, as revised, prohibits payments based on the number of signatures obtained. Or. Const. Art. IV § 1b. But this Constitutional provision has been interpreted in the Oregon Administrative Rules as not prohibiting salary raises or bonuses based on circulator's productivity, so long as the payment is not based on a per signature calculation. Or. Admin. R. 165-014-0260. Also, circulators in Ohio face a special challenge in that a certain percentage of total signatures must be gathered from each of one-half of the 88 counties in Ohio, which necessitates that circulators gather signatures from lesser populated counties. Ohio Const. Art. II § 1g. Michael Arno testified that in Oregon petition circulators focus most of their attention on the Portland area. The Ohio county-distribution requirement would appear to make gathering signatures in Ohio a more difficult effort in the best of circumstances.

Finally, in Ohio, each signature on a part-petition, as the signature sheets are called, is verified individually by the county board of elections for the county in which the signators reside to determine if the signators are registered voters and to eliminate any potential instances of fraud. O.R.C. § 3519.15. In Oregon, conversely, the Secretary of State verifies the petitions using "a statistical sampling technique to verify whether a petition contains the required number of signatures of electors." Or. Rev. Stat. 250.105(4). It also then employs statistical sampling to select a fraction of the petition signatures to verify. Or. Admin. R. 165-

014-0110. Thus, the likelihood of finding any instances of irregularities or fraud that might have occurred in the petitions appears to be greater in Ohio.

On the whole, Plaintiffs' evidence establishes that the Statute would burden initiative proponents in Ohio by increasing their costs, increasing the time needed to qualify ballot measures, and as a result, making it more difficult to collect signatures and place measures on the ballot. Undoubtedly, the Statute, though not as burdensome as the complete payment prohibition struck down in Meyer, both "limit[s] the number of voices who will convey [the political] message and the hours they can speak and, therefore, limits the size of the audience they can reach" and "mak[es] it less likely that [the proponents of the amendment] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Meyer, 486 U.S. at 423.

As to the State's justification for the per-signature payment prohibition, the State relies in large part upon the documented instances of irregularities or fraud that occurred in the signature collection effort to place Ralph Nader's name on the ballot for the 2004 presidential election. The Nader petition circulators were paid on the per-signature basis. The fraud included instances where the name of the petition circulator was forged, where persons who signed off as the petition circulator did not actually circulate the petition or witness the signators' signatures, and where petition circulators misrepresented that the Nader petition was a petition related to same-sex marriage. (Doc. 9-4.)

Chief Judge Beckwith, in the Temporary Restraining Order, criticized this evidence as not proving that the method of payment was the cause of or incentive to the fraud. This Court agrees. The Nader evidence does not establish that the fraud would have been less likely to occur had the circulators been paid on a hourly basis.

The State also submits the affidavit of Bryan C. Williams, Director of the Summit County Board of Elections, who testified about an instance in Summit County where one petition circulator who was paid per-signature had his part-petitions invalidated in toto based on numerous irregularities in the part-petitions. (Doc. 35.) A great number of the signatures on the part-petitions were determined to contain the names of persons who were not registered voters. Like the Nader petition evidence, the Williams affidavit in no way isolates the per-signature payment method as the cause of the irregularity. Other evidence submitted by the State regarding supposed fraud in Ohio similarly fails to prove that the per-payment signature method is an incentive to fraud. A criminal indictment against Kevin Eugene Dooley in Franklin County, Ohio for forging a false voter registration form proves nothing, primarily because the Court will not infer guilt from an indictment. (Doc. 37.) Interestingly, the indictment alleges that Dooley was paid both per hour and a fee for each new voter registered above a set goal. An indictment against and guilty plea by Chad A. Staton in Defiance County, Ohio for ten counts of false voter registration does not contain any information from which the Court could infer that Staton was paid per-signature or that such payment was the motivation for the fraud. (Doc. 39.) Finally, the Court struck as inadmissible "evidence" in the form of

newspaper articles discussing possible instances of irregularities in the November 2006 election. (Doc. 58.) The newspaper articles did not support the State's argument in any event because, among other reasons, the articles did not establish that the circulators involved were paid on a per-signature basis.

The State also submits evidence related to instances of fraud in Oregon by circulators working under the per-signature payment method before Oregon passed a per-signature payment prohibition. The evidence is submitted in the form of an affidavit of John Lindback, the Director of the Election Division for the Oregon Secretary of State's office, and supporting exhibits. (Doc. 51-2.) Plaintiffs challenge the admissibility of the Lindback affidavit and exhibits on a Rule 56 motion. The main point of Lindback's affidavit testimony is his belief that "per-signature payments are a significant incentive to fraud." (Doc. 51-2 ¶ 12.) He states that he bases his conclusion on his "comprehensive catalog of experience," including "substantial responsibility for investigating complaints related to initiative and referendum process and reviewing reports generated during such investigations." (Id. ¶¶ 1, 13.) He then identifies several ways that circulators perpetuated fraud when gathering signatures in Oregon and he cites to anecdotal evidence based on investigative reports and a deposition that are attached as exhibits to his affidavit.

The investigative report exhibits concern investigations conducted at the request of Lindback's office regarding suspected incidents of petition signature fraud. (Doc. 51-2.) The investigative reports and the factual findings therein are

admissible under the public records and reports hearsay exception contained in Rule 803(8)(c) of the Federal Rules of Evidence. However, the numerous sections of the investigative reports that merely recount witness interviews are inadmissible as hearsay under Rule 801 of the Federal Rules of Evidence. Nowell v. City of Cincinnati, 2006 WL 2619846, at *5 (S.D. Ohio Sept. 12, 2006) (Dlott, J.); see also Chicago Ins. Co. v. Chiminee Cricket, 17 Fed. Appx. 374, 378 (6th Cir. 2001) (not admitting investigation report based on untrustworthy witness hearsay statements); but see Leary v. Livingston Cty., 2006 WL 2865213, at *5 (E.D. Mich. Oct. 5, 2006) ("The reports, and accompanying statements made by witnesses recorded in the reports, fall under this [Rule 803(8)] exception."). The difficulty here is that the investigative reports are almost devoid of factual findings, and instead contain only witness statement summaries. The Lindack affidavit also references and contains as an exhibit a small portion of a deposition transcript from an Oregon case. That deposition is not admissible for the truth of the matters asserted therein in this case.

The Court finds that the Lindback affidavit, and the exhibits attached thereto, are not probative of the issue before the Court even to the extent they are admissible. The affidavit and exhibits would tend to establish that certain circulators in Oregon who were paid on a per-signature basis or a productivity basis submitted numerous false signatures. However, as discussed above, stark differences exist between the Ohio initiative process and the Oregon initiative process. The Court will not extrapolate that the per-signature payment method is an incentive to fraud in Ohio, whereas an hourly payment system would discourage fraud in Ohio,

based on instances of apparent fraud occurring in a different state where signatures are verified using a statistical sampling method.

In sum, the Court finds that the State has not submitted evidence that the per-signature payment method is such an incentive to fraud that would justify the burden the Statute places on initiative proponents' core political speech rights. The Court's decision is informed by a growing body of jurisprudence examining similar per-signature payment prohibitions enacted in other states. In earlier district court cases striking down laws that prohibited per-signature payment, a common theme was the defendants' failure to provide evidence that the per-signature method of payment caused actual fraud.

A district court analyzing a Washingon law framed the issue as follows: "Unless there is some proof of fraud or actual threat to citizens' confidence in government which would provide a compelling justification, the right of public discussion of issues may not be infringed by laws restricting expenditures on referenda and initiative campaigns." LIMIT v. Maleng, 874 F.Supp. 1138, 1141 (W.D. Wash. 1994). The defendants conceded that they had no actual proof of fraud stemming from the payment of per-signature method of collection. Id. at 1140. The court held that the Washington law was unconstitutional. Id. at 1140-41.

In Mississippi, the plaintiffs challenging a law prohibiting per-signature and per-petition payment schemes established that the law burdened political expression, including with evidence that circulators paid a flat daily rate collected "far fewer" signatures

than those paid per-signature and that some circulators would only work on a per-signature basis. See Term Limits Leadership Council v. Clark, 984 F.Supp. 470, 471-73 (S.D. Miss. 1997). Conversely, the defendants offered only speculation, not direct evidence, that circulators paid per-signature were more likely to commit fraud than circulators paid per-day or per-hour. Id. at 474-75. Thus, the court found that the law violated the First Amendment. Id. at 470-71.

Likewise, opponents of a similar law in Maine presented evidence from their personal experience in Maine and in another state that per-signature payment prohibitions created uncertainties in the cost and length of petition circulation, increased the costs of petition circulation, required additional hires, and resulted in the collection of fewer signatures. See On Our Terms '97 PAC, 101 F.Supp.2d 19, 22-23 (D. Me. 1999). The State of Maine did not offer evidence that there was a higher incidence of fraud based on the per-signature method than there is with other methods. Id. at 25. The court held that the law was unconstitutional because it severely burdened First Amendment speech, but was not narrowly tailored to serve a compelling state interest. Id. at 25-26.

The District Court for Idaho applied strict scrutiny analysis from Meyer when it struck down a law prohibiting per-signature payments. Idaho Coalition United for Bears v. Cenarrusa, 234 F.Supp.2d 1159, 1165 (D. Idaho 2001) (quoting Idaho Code § 34-1821). Because the court found that the law chilled protected speech and did not find evidence that payment on a per-signature basis

encouraged fraud, it held that the law violated the First Amendment. Id. at 1165-66.

In three later court of appeals decisions, the appeals courts accepted the evidence submitted by the respective states that the per-signature payment prohibition was necessary to ensure the integrity of the voting process. In Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001), North Dakota produced evidence concerning an incident in 1994 where 17,000 petition signatures were invalidated and "a subsequent investigation revealed that payment per signature was an issue in the 1994 incident." Id. at 618. It is not clear from the decision exactly what the Ninth Circuit panel meant by the phrase "payment per signature was an issue" and it is therefore difficult to compare the quantum of evidence submitted in that case to the evidence submitted by the State of Ohio here. Perhaps more importantly, the court found in Jaeger, unlike here, that the plaintiffs had offered only bare assertions, and not evidence, that a payment per-hour scheme would burden their ability to collect signatures.

The Ninth Circuit likewise upheld the Oregon per-signature payment prohibition, but again the evidence submitted in that case was of a different quality than the evidence submitted here. Prete v. Bradbury, 438 F.3d 949, 961-62 (9th Cir. 2006). The Prete court found that the law imposed only a lesser burden on free speech, and Oregon had an "important regulatory interest in preventing fraud and its appearances in its electoral processes." Id. at 969-71. It accepted Oregon's evidence that some signature gatherers paid per-signature had engaged in fraud. Id. at 970. But it rejected the plaintiff's claims that per-signature payment prohibition

decreased the pool of circulators, made it more difficult to qualify initiative or referendum measures for the ballot, and resulted in a significant decrease in the number of valid signatures obtained. Id. at 963-64.

The Ninth Circuit discounted testimony from the plaintiffs' witnesses, including William Arno and Tracy Taylor, that professional petitioner circulators would not be interested in circulating petitions in Oregon after the per-signature payment prohibition passed because the Arno and Taylor could not testify that the circulators would work in Oregon in the absence of the prohibition. Id. at 964. No witness in Prete testified that he or she would have worked in Oregon in the absence of the prohibition. Plaintiffs here presented stronger evidence. Tracy Taylor testified that the top coordinators he had used for prior Ohio initiatives refused to work in Ohio on an hourly pay basis. (Taylor Dep. at 53.) Taylor's testimony is boosted by that of Gena Ranger who stated that she would not work in Ohio, where she had worked before, for hourly pay. (Ranger Decl. ¶ 5.)

The plaintiffs' case in Prete also was hurt when the Ninth Circuit credited the testimony of a professor who stated that the limited available evidence suggested that circulators paid by the hour obtained a higher validity rate than those paid per-signature. Id. at 966. The State of Ohio offers no evidence that circulators paid per-hour would have similar success in Ohio and the difference in the initiative procedures in the two states cautions against using the Oregon experience as a predictor of what would happen in Ohio. Even the Prete court noted that the Oregon law did "not prohibit adjusting

salaries or paying bonuses according to validity rates or productivity." Id. at 968.

Finally, and most recently, in a short decision issued under time constraints, the Second Circuit held consistent with Jaeger and Prete that a prohibition on per-signature payment "does not impose unduly burdensome and unjustified restrictions on the payment of petition signature collectors." Person v. New York State Bd. of Elections, – F.3d –, 2006 WL 2961240, at *2 (2nd Cir. Oct. 18, 2006). The court explained its decision as follows: "[W]e find the record presented to us provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in Meyer, or that the alternative methods of payment it leaves available are insufficient." Id.

However, the opinion is so lacking in legal analysis as to be of little persuasive authority. In sum, the Court is satisfied that this case, based on the evidence submitted, is more analogous to the District Court decisions in which similar per-signature prohibitions were struck down than to the Circuit Court of Appeals decisions where such prohibitions were upheld. CTR has established with evidence that the Ohio Statute would burden the core political speech of initiative proponents by making it more difficult to retain circulators to communicate their political message, thus limiting the size of the audience it can reach and making it less likely that they will gather the number of signatures needed to place an initiative on the ballot. See Meyer, 486 U.S. at 423. Conversely, while the State of Ohio's evidence might show that fraud has

occurred when the payment per-signature method is used, it has not isolated the form of payment as being the cause of or an incentive to widespread petition signature fraud in Ohio. As such, the Court finds that O.R.C. § 3599.111 is unconstitutional.

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment is **GRANTED** against the State of Ohio and the State of Ohio's Motion for Summary Judgment is **DENIED**.

III. CONCLUSION

The Court hereby GRANTS the Motions for Summary Judgment filed by Defendants Joseph T. Deters and Mathias H. Heck, Jr. (docs. 32, 24.) The Court hereby further **GRANTS** Plaintiffs' Motion for Summary Judgment (doc. 29) against the State of Ohio, **DENIES** the State of Ohio's Motion for Summary Judgment (doc. 33), declares that the O.R.C. § 3599.111 is unconstitutional, and enjoins its enforcement.

IT IS SO ORDERED.

s/Susan J. Dlott
United States District Judge

APPENDIX C

TEMPORARY RESTRAINING ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Citizens for Tax Reform, et al.,

Plaintiffs,

vs.

Joseph T. Deters, et al.,

Defendants.

Case No. 1:05-CV-212

Temporary Restraining Order

Citizens for Tax Reform wishes to circulate an initiative petition for the purpose of placing a proposed amendment to the Ohio Constitution on the November 2005. Prior to March 31, 2005, Plaintiffs had engaged Arno Political Consultants ("Arno"), a California-based political consulting firm that specializes in collecting signatures for initiative and referendum efforts, to collect signatures on their initiative petitions through the use of circulators paid on a per-signature basis. When Plaintiffs entered into their agreement with Arno the use of paid circulators was legal in the State of Ohio. On March 31, 2005, however, Ohio Revised Code ("O.R.C.") § 3599.111, which prohibits the use of circulators paid on a per-signature basis, became

effective. Plaintiffs then initiated this action, alleging that the newly effective statute violates rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. They simultaneously filed the motion for temporary restraining order that is presently before the Court.

The parties agree that the ostensible purpose of the challenged statute is the prevention of fraud in the process of collecting signatures on political petitions, including initiative petitions. The Ohio General Assembly passed the statute as a reform to Ohio's initiative and referendum process in response to extensive fraud in the collection of signatures on petitions supporting the placement of Ralph Nader's name on the Ohio ballot for President of the United States in November 2004. Some or all of that fraud was perpetrated by petition circulators who were paid on a per-signature basis.

Defendants herein, including the Intervenor-Defendant, Ohio Attorney General James Petro as representative of the State of Ohio, have not introduced evidence or otherwise suggested that professional circulators paid on any basis other than per signature were involved in the circulation of petitions favoring the addition of Mr. Nader to the Ohio presidential ballot. In other words, the State has not attempted to demonstrate, by means other than supposition, that the method of calculating the pay of the paid circulators was the cause of the fraud. The State has argued that reason supports its position that the incentive to commit fraud is greater when payment is made on a per signature, rather than a per hour or other time incremental, basis.

The State acknowledges that the General Assembly could not have acted to prohibit all circulation of petitions in Ohio by paid circulators. The United States Supreme Court declared in 1988 that a Colorado statute that prohibited payment to petition circulators was an infringement of rights of political speech guaranteed by the First Amendment. See Meyer v. Grant, 486 U.S. 414, 422-23 (1988). The Court held that the prohibition restricted political speech by limiting "the number of voices who will convey [the political] message and the hours they can speak and, therefore, limits the size of the audience they can reach." Id. The Court identified a second manner in which the prohibition restricted core political speech, which, the Court stated, includes the circulation of petitions: "it makes it less likely that [the proponents of the amendment] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Id. at 423.

The Supreme Court did not invalidate all restrictions on core political speech in the form of the circulation of petitions; although, it did explicitly recognize that the First Amendment protects amendment proponents' "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." Id. at 424. The Court considered the State of Colorado's expressed justifications for the restriction of a protected right, including the protection of the integrity of the initiative process. See id. at 425. The Court concluded, however, that Colorado had "failed to demonstrate that it is necessary to burden [the amendment proponents'] ability to communicate their message in order to meet its concerns." Id. at

426. The Court noted the lack of evidence in support of the State's theory that the prohibition was necessary to eliminate the temptation to "accept false signatures" and stated that it was unprepared to assume that a professional circulator "whose qualifications for similar future assignments may well depend on a reputation for competence and integrity" is more likely to accept false signatures than a volunteer. Id.

The Meyer court expressed that it was persuaded by the presence in the Colorado statutes of criminal penalties for forging a signature on a petition, making false or misleading statements relating to a petition, or paying someone to sign a petition. See id. at 427. The Court noted that those "provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." Id. The State of Colorado had, apparently, not attempted to demonstrate that it had prosecuted or investigated offenses of the criminal statutes and yet failed to curtail fraud in the petition process. So, the Court recognized the theoretical possibility that a governmental interest might compel a restriction on the right to circulate a petition, but it did so while affirming that the area is one in which the protection of the First Amendment is "at its zenith" so that the burden a state must overcome to justify a restriction is "well-nigh insurmountable." Id. at 425.

Since the Meyer decision, various federal courts have considered state statutes prohibiting the payment of petition circulators on a per signature basis. In LIMIT v. Maleng, 874 F.Supp. 1138 (W.D. Wash. 1994), for example, the Court concluded that a Washington statute prohibiting the use of circulators paid per signature was not justified by actual

evidence that that method of payment increased the incidence of fraud. The court observed that actual evidence was required in the context of constitutional challenges to legislation restricting expenditures in ballot referenda and initiative campaigns. See id. at 1141 (citing Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981)). The Court struck down the Washington statute. See id. at 1142.

A Maine district court struck down a similar Maine statute for the same reason. See On Our Terms '97 PAC v. Secretary of State, 101 F.Supp.2d 19 (D.Me. 1999). The court observed that the state had offered "no evidence whatsoever that fraud is more pervasive among circulators paid per signature." Id. at 26. The court specifically rejected that state's "supposition" that payment may affect the incidence of fraud, noting that a state must establish that "its regulation is narrowly tailored to meet a compelling need." Id. at 25 (citing Meyer, 486 U.S. at 426).

A third district court, sitting in Mississippi, invalidated a similar Mississippi statute on the same basis. See Term Limits Leadership Council, Inc. v. Clark, 984 F.Supp. 470 (S.D. Miss. 1997). The court noted that Mississippi could not "avoid strict scrutiny of the statute[], which is to say, it cannot avoid its burden to justify that statute[] by demonstrating a compelling interest and showing further that the statute[is] the least restrictive means of addressing the state's interest." Id. at 473 (citing Meyer, 486 U.S. at 424). The court observed that Mississippi's effort to justify the statute by supposition "flies directly in the face of Supreme Court's refusal in Meyer to assume that paid petition

circulators were more likely to commit fraud than volunteers." Id. at 473 n.3.

In the Mississippi case, the state had argued, as Ohio has in this matter, "that paying circulators on a per-signature basis encourages fraud by those circulators since it gives them incentive to obtain signatures by any possible means, including fraud." Id. at 474. The court concluded that that hypothesis, however rooted in logic or expert opinion, did not tend to prove what the State must prove, namely, actual fraud or threat to citizens' confidence in government posed by . . . circulators who are paid per signature." Id. at 475. The court reiterated that the Meyer court had identified the state's burden as showing "that paid circulators were actually more likely to commit fraud" and held the State of Mississippi to the same burden as regards circulators paid on a per-signature basis. Id. Finding "no proof to support such a finding," the court invalidated the Mississippi statute. Id.

The factors the Court considers in determining whether to issue a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure are as follows:

> (1) whether the plaintiff has shown a likelihood that it will succeed on the merits of its claims;
>
> (2) whether the plaintiff will suffer irreparable harm if the temporary restraining order does not issue;

> (3) the probability that granting the temporary restraining order will cause substantial harm to third parties; and
>
> (4) whether the public interest is advanced by the issuance of the temporary restraining order.

See Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994) (6th Cir. 1993)). Those four considerations are "factors to be balanced, not prerequisites that must be met." In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985). The degree of likelihood of success on the merits required to support the issuance of a temporary restraining order may, therefore, depends on the strength of the other factors considered. See Washington, 35 F.3d at 1099 (citing DeLorean, supra).

The Court is persuaded that Plaintiffs' likelihood of success on the merits of their claim, under the First Amendment, that O.R.C. § 3599.111 impermissibly infringes upon their core political speech rights is very high. While the parties disagree as to the quality of proof that each must offer at this stage of these proceedings, the Court is persuaded that Plaintiffs' burden is to assert that the restriction on payment of petition circulators on a per-signature basis will "burden their ability to collect signatures." Initiative & Referendum Institute v. Jaeger, 241 F.3d 614, 618 (8th Cir. 2001). Plaintiffs may have been required to adduce actual evidence of such a burdening effect had the State introduced evidence in support of its supposition that payment on a per-signature basis causes, or increases the incidence of, fraud. See id. Absent such evidence from the State,

assertions that the restriction burdens core political speech are sufficient. See id.

In either case, Plaintiffs have satisfied their burden. They have introduced actual evidence that tends to show that the restriction on payment of petition circulators on a per-signature basis limits their ability to retain effective circulators and reduces the likelihood that they will succeed in placing their initiative on the November 2005 ballot. The State of Ohio, on the other hand, has failed to adduce evidence of the necessity of the statute to prevent fraud in the initiative process. While evidence identified by the State demonstrates that fraud has occurred in the context of circulation of petitions by circulators paid on a per-signature basis, it has not isolated the method of payment as the cause of, or an incentive to, the fraud.

In the Ralph Nader petition matter, circulators were not, apparently, paid on any basis other than per signature. Accordingly, the State is unable to rely upon evidence generated in the context of its investigation of that matter to prove that compensation on a per-signature basis generates fraud at a greater rate than other forms of compensation. Its argument to that effect is mere supposition and insufficient to defeat Plaintiffs' assertions in the opinions of all of the courts that have considered the matter, including the Eighth Circuit Court of Appeals, upon whose decision in Jaeger, supra, the State of Ohio relies primarily.

The harm to the Plaintiffs that would result from this Court's refusal to grant the requested temporary equitable relief is the impairment of a First Amendment right. Such an impairment, even

for a short period of time, is irreparable harm. See, e.g., Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998) (citing Elrod v. Burns, 427 U.S. 347 (1976) (plurality); Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989)), cert. denied, 526 U.S. 1087 (1999). Thus, to the extent that Plaintiffs have established a likelihood of success on the merits of their First Amendment claim, they have also established the possibility of irreparable harm as a result of the impairment of their core political speech rights. See Connection Distributing, 154 F.3d at 288 (citing Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir. 1995), cert. denied, 517 U.S. 1135 (1996)).

The State has argued that any harm to Plaintiffs is merely economic, inasmuch as the collection of signatures on their initiative petitions may be more costly in light of the restriction embodied in O.R.C. § 3599.111. That argument ignores Plaintiffs' assertion that they are less likely to succeed in placing their initiative on the ballot if they are prohibited from paying circulators on a per-signature basis. The Supreme Court in Meyer concluded that a restriction on speech that "makes it less likely" that a petition drive will be successful burdens a right protected by the First Amendment. See Meyer, 486 U.S. at 423. The potential harm to Plaintiffs, therefore, is the loss or impairment of a Constitutional right, not merely an economic injury.

The State and the other Defendants have failed to identify a harm that will befall third parties in the event that the Court issues the requested temporary restraining order. The Court perceives none.

Finally, the preservation and defense of constitutional rights is always in the public interest. See, e.g., G & V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383 (1979); Planned Parenthood Association v. Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)). The Court concludes, therefore, that each of the relevant factors favors the issuance of the requested temporary restraining order in this case.

For those reasons, the Court hereby **ENJOINS** the Defendants from enforcing O.R.C. § 3599.111 pending further order of this Court or the United States Court of Appeals. The Court will not require payment of bond. The Court will conduct a hearing on Plaintiffs' motion for a preliminary injunction on May 6, 2005, beginning at 9:00 a.m.

IT IS SO ORDERED.

s/Sandra S. Beckwith, Chief Judge
United States District Court

103

No. 08-151

Supreme Court, U.S.
FILED
OCT 8 - 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

DAVID R. LANGDON
Counsel of Record
LANGDON LAW LLC
11175 READING ROAD
SUITE 104
CINCINNATI, OH 45241
(513) 733-1038
(513) 577-7383 FAX

Counsel for Respondents

October 8, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether this Court should grant review despite the absence of a conflict among the circuits concerning the proper legal standard to be applied in a First Amendment challenge to a state elections statute that severely burdens core political speech.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

I. MATERIAL FACTS 1

II. PROCEEDINGS BELOW. 2

A. District Court 2

B. Sixth Circuit 6

REASONS FOR DENYING THE WRIT 8

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS 9

II. PETITIONER'S UNWARRANTED CONCERN THAT THE COURT OF APPEALS DIMINISHED THE IMPORTANCE OF ITS INTERESTS DOES NOT JUSTIFY REVIEW BY THIS COURT 18

III. PETITIONER'S ASSERTIONS THAT THE COURT BELOW ERRED IN ITS FACTUAL FINDINGS AND THAT IT MISAPPLIED WELL-SETTLED LAW ARE NOT COMPELLING REASONS TO GRANT A WRIT OF *CERTIORARI*. 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES:

Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999) ..... *passim*

Grayned v. City of Rockford,
408 U.S. 104 (1972) 11

Idaho Coalition for Bears v. Cenarrusa,
234 F. Supp.2d 1159 (D. Id. 2001) 5, 16

Initiative & Referendum Institute v. Jaeger,
241 F.3d 614 (8th Cir. 2001) 5, 15

Lee v. Keith,
463 F.3d 763 (7th Cir. 2006) 6

LIMIT v. Maleng,
874 F. Supp. 1138 (W.D. Wa. 1994)..... 4, 16

Meyer v. Grant,
486 U.S. 414 (1988) ..... *passim*

On Our Terms '97 PAC v. Sec. of State of Maine,
101 F. Supp.2d 19 (D. Me. 1999)..... 4

Person v. New York State Bd. of Elections,
467 F.3d 141 (2d Cir. 2006)..... 5, 17

Prete v. Bradbury,
438 F.3d 949 (9th Cir. 2006) 5, 16

Term Limits Leadership Council v. Clark,
984 F. Supp. 470 (S.D. Miss. 1997) 4

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) ..... *passim*

United States v. Johnston,
268 U.S. 220 (1925) 22

United States v. Thirty-Seven (37) Photographs,
402 U.S. 363 (1971) 11

Virginia v. Am. Booksellers Ass'n,
484 U.S. 383 (1988) 11

STATUTES:

28 U.S.C. § 1331 1

O.R.C. § 3599.111 ..... *passim*

COURT RULES:

Sup. Ct. R. 10 ..... 8, 18, 22

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 518 F.3d 375. The opinion of the district court (Pet. App. 28a-49a) is reported at 462 F. Supp.2d 827. One earlier opinion of the district court (Pet. App. 50a-59a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2008. The petition for a writ of certiorari was filed on August 4, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1331.

STATEMENT

I. MATERIAL FACTS

Ohio law forbids any method of paying circulators of initiative petitions "except on the basis of time worked." O.R.C. § 3599.111(D). Thus, no person may pay or receive payment for circulating a petition "on a fee per signature or fee per volume basis." O.R.C. § 3599.111(B).

At the time this law was enacted in 2005, Citizens for Tax Reform (CTR) was preparing for an initiative petition effort designed to qualify a constitutional amendment to the ballot. Pet. App. 4a. As part of this preparation, CTR had engaged a political consulting firm to collect signatures and manage the overall petition effort. *Id.* CTR's agreement with the consulting firm specified that it would pay $1.70 to the firm for each signature

collected, up to 450,000 signatures, for a maximum total cost of $765,000. *Id.*

Upon passage of the new law, the consulting firm, which had experience operating under a similar law in Oregon, advised CTR that the agreement would need to be amended to comply with the law. *Id.* No longer could CTR pay for signatures at a fixed price; it would now have to pay for labor, based on "time and materials." *Id.* at 4a, 36a. The firm also advised CTR that under the per-time-only requirement, the cost of the petition effort (for the same 450,000 signatures) would increase dramatically—by at least an additional $300,000, and possibly by much more. *Id.*

Finally, the firm advised CTR that under an exclusively per-time payment scheme, it would have trouble hiring the best circulators; the pool of available circulators, consequently, would be limited to those with considerably less experience than the "professional" circulators that the firm typically hired. *Id.* at 37a. Based on the effects of the new law—and in particular, the significant increase in cost—CTR concluded that it could not afford to go forward with its petition campaign. *Id.* at 4a.

II. PROCEEDINGS BELOW

A. District Court

Rather than forego the initiative effort, CTR filed a lawsuit in which it claimed that the Statute imposed a severe and unjustified burden on its First Amendment rights. Pet. App. 3a-4a. CTR initially moved for a temporary restraining order, seeking an

injunction that would allow it to proceed with its time-sensitive petition effort under the original terms of its agreement with the petition-collection firm. *Id.* at 5a.

The district court granted the motion and issued a temporary restraining order enjoining the State from enforcing the Statute. *Id.* The court found that CTR had presented actual evidence that the regulation would make it more difficult to retain effective circulators, thereby restricting its ability to qualify the initiative to the ballot and, consequently, reducing the likelihood that its constitutional amendment would become the subject of a statewide campaign. *Id.* The court thus concluded that CTR had demonstrated a high likelihood that the Statute impermissibly infringed upon CTR's core political speech rights. *Id.* at 56a.

The district court also found that, although the State had introduced some evidence of fraud in the 2004 Nader petition effort, it had failed to produce any evidence of a causal link between the fraud and the method of payment, as required by *Meyer v. Grant*, 486 U.S. 414 (1988). Pet. App. 5a, 58a. Accordingly, the district court temporarily enjoined the Statute, thereby permitting CTR to move ahead with its petition effort under its original fixed-price agreement. *Id.* at 5a.

The parties agreed to convert the TRO to a preliminary injunction for the duration of the litigation, *id.* at 5a, and, after discovery, each filed a cross-motion for summary judgment. *Id.* at 6a. The district court granted summary judgment in favor of CTR. *Id.* at 6a, 28a.

Following *Meyer* and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the district court looked at whether the Statute burdened CTR's core political speech rights and, if so, whether such a burden was justified by the State's interest in preventing fraud. Pet. App. 34a. It found that CTR had established that the Statute would increase petition-circulation costs by as much as 60% and that the most experienced and effective circulators, who would work if paid by the signature, would refuse to work if paid by the hour. *Id.* at 37a. As in the previous proceeding, the district court held that because the Statute limited CTR's ability to retain effective circulators and because it reduced the likelihood that petition proponents would be able to qualify their petitions for the ballot, the Statute burdened core political speech rights. *Id.* at 6a.

The court held that the State, on the other hand, in its attempt to justify the Statute's burden on political speech, had presented only inconclusive, irrelevant, or otherwise inadmissible evidence. *Id.* at 6a, 40a-44a. In particular, the State had offered no evidence to show that the per-signature payment method produced a significant incentive to fraud. *Id.* at 6a. Failure to produce such evidence, the court noted, was a common thread through the several previous district court decisions in which similar regulations in other states had been invalidated on First Amendment grounds. *Id.* at 44a-46a (citing *LIMIT v. Maleng*, 874 F. Supp. 1138 (W.D. Wa. 1994); *Term Limits Leadership Council v. Clark*, 984 F. Supp. 470 (S.D. Miss. 1997); *On Our Terms '97 PAC v. Secretary of State of Maine*, 101 F. Supp.2d

19 (D. Me. 1999); *Idaho Coalition for Bears v. Cenarrusa*, 234 F. Supp.2d 1159 (D. Id. 2001)).

The district court also noted that previous court of appeals' decisions upholding similar statutes were distinguishable from this case in several respects. Pet. App. 46a-48a (citing *Initiative & Referendum Institute (IRI) v. Jaeger*, 241 F.3d 614 (8th Cir. 2001); *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006); *Person v. New York State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006)). First, in each of these decisions the States had sufficiently substantiated the necessity of such regulations, while the plaintiffs had produced insufficient evidence of a burden on petition circulation. Pet. App. 46a-48a. The court found that in this case, however, the situation was reversed: CTR had produced actual evidence to prove the burden on its speech, but the State had offered no evidence to show the necessity of such a burden. Pet. App. 48a.

Second, the Court catalogued numerous differences between the comprehensive petition requirements in Ohio and those of the States in which similar laws had been upheld. *Id.* at 39a-40a. Comparing the Statute to its Oregon counterpart, the district court found that: the Statute was fundamentally more restrictive than the Oregon law; Ohio's county-distribution requirement made signature collection more difficult than in Oregon, where no such requirement is imposed; and Ohio's practice of individually verifying each signature made the detection of irregularities and fraud much easier than in Oregon, where signatures are counted by means of statistical sampling. *Id.* Based on those

comparisons, the district court found this case to be less analogous to those cases in which similar laws had been upheld and more analogous to those in which the pay-per-signature laws had been struck down. In light of these distinctions and based upon its findings that CTR had met its evidentiary burden and that the State had not met its own burden, the court declared the Ohio statute unconstitutional and granted summary judgment to CTR. *Id.* at 49a.

B. Sixth Circuit

On appeal, the Sixth Circuit affirmed. Pet. App. 3a. The court of appeals evaluated the constitutionality of the Statute using the fact-intensive sliding-scale analysis set forth in *Meyer*, *Timmons*, and *Buckley*,[1] and in the Seventh Circuit's decision in *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006). Pet. App. 15a-16a. The court also drew upon the decisions of its sister courts in *IRI*, *Prete*, and *Person* for the principle that the severity of the burden resulting from the regulation is measured both by the availability of other payment methods and also by the extent to which more effective means are foreclosed. Pet. App. 15a-16a.

The court of appeals recognized that the Statute's per-signature ban made the petition process significantly more costly and that it made it more difficult to employ the most effective circulators. *Id.* at 16a-19a. In addition, the court noted that, if the Statute were upheld, it would eliminate the opportunity for a petitioner to enter into a fixed-price contract with a political consulting

[1] *Buckley v. Am. Const. Law Found.*, 525 U.S. 182 (1999).

firm and would increase the amount of time it would take to get the necessary signatures. Each of these factors, the court found, increased the risks involved in initiating the petition process. *Id.* The court of appeals also noted that, while the statutes upheld by other circuit courts had merely banned one method of paying circulators, the Ohio statute had attempted to ban all methods except for one, which made it more restrictive. *Id.* at 21a-24a.

In light of all its factual findings, the court of appeals concluded that the Statute imposed a severe burden on petitioners' core speech rights. *Id.* at 24a. Thus, the court subjected the Statute to the familiar "well-nigh insurmountable" scrutiny required under *Meyer*, *Timmons*, and *Buckley*, which proscribes that unless the Statute is "narrowly tailored and advance[s] a compelling state interest," it is invalid under the First Amendment. Pet. App. 24a.

Applying this standard, the court of appeals affirmed the State's compelling interest in eliminating election fraud. *Id.* The court concluded, nevertheless, that because of the low probative value of the State's evidence that the regulation was necessary, and because of the adequate protections against fraud which were already in place, the State had failed to demonstrate that the Statute was narrowly tailored. *Id.* at 24a-27a. The court, therefore, affirmed summary judgment for CTR. *Id.* at 27a.

REASONS FOR DENYING THE WRIT

Petitioner's principal argument in support of review is that the Sixth Circuit's invalidation of the Statute creates a conflict with decisions of the Second Circuit (*Person*), the Eighth Circuit (*IRI*), and the Ninth Circuit (*Prete*). Pet. 11-17. Such a conflict, however, does not exist, for the Sixth Circuit applied precisely the same legal standard as the other courts; the divergent outcome of this case was the unremarkable result of applying the common legal standard to crucially different facts.

Petitioner also asks this Court to grant a writ of *certiorari* to "vindicate" its interest in preventing election fraud by petition circulators, the importance of which Petitioner claims has been undermined by the Sixth Circuit's decision. Pet. 17-24. "Vindicating important state interests," however, is not a compelling justification for this Court's intervention. Even if it were, the Sixth Circuit has not diminished the importance of the State's interest in eliminating fraud; rather, it has affirmed it, concluding that the State's interest is "certainly compelling." Pet. App. 24a.

Finally, Petitioner asserts that this case merits review because the Sixth Circuit erred on the facts and the law. Pet. 24-37. But this proffered basis for review is one this Court has affirmatively identified as ordinarily *not* justifying review. See Sup. Ct. R. 10.

Because the petition fails to satisfy any of the traditional criteria for a writ of *certiorari*, review should be denied.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS.

A.

Petitioner asks this Court to grant a writ of *certiorari* to resolve an alleged conflict among circuits. Pet. 11. But the differing case outcomes Petitioner identifies have resulted not from the application of inconsistent legal principles, but from the significant factual differences of each case.

The four circuit courts of appeal that have evaluated the per-signature payment bans have done so under the same well-established "severe burden" standard, as prescribed by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (for election-related restrictions in general), and *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999) (for restrictions on petition circulation in particular). Thus, there is no "division of authority" among the courts concerning the proper standard for First Amendment challenges to restrictions on petition circulators. Review, therefore, should be denied.

B.

Ironically, even Petitioner acknowledges that the standard applied by all the courts has been the same. Pet. 12-13 ("Applying the balancing test set forth in *Timmons*, these courts properly held that pay-per-signature bans do not impose a severe burden on speech"); Pet. 24 (the Sixth Circuit applied *Timmons*). Nevertheless, Petitioner contends that the case merits this Court's review because, "rather than following th[e] clear precedent" from

the other circuits (upholding per-signature payment bans against constitutional challenge), the Sixth Circuit "manufactured two artificial distinctions" between the Ohio statute and those upheld in *IRI*, *Prete*, and *Person*. Pet. 13.[2] Indeed, according to Petitioner, only by reading the Statute in an "unjustifiably broad fashion" and by "ignoring the canon of constitutional avoidance" was the Sixth Circuit able to distinguish the Statute from the laws in the other states and to justify its departure from the "well-reasoned" decisions of the circuits upholding those laws. Pet. 11.

Petitioner's argument is built upon several false premises, each of which is discussed below.

1. First, the Sixth Circuit did not misinterpret the Statute. Indeed, it did not "interpret" the Statute at all. Far from being ambiguous, the Statute plainly prescribes a single and exclusive method by which a person may be compensated for collecting signatures: "on the basis of time worked." O.R.C. § 3599.111(D). If this were not clear enough, the Statute further proscribes any person from receiving compensation for collecting signatures on a petition "on a fee per signature or fee per volume basis." O.R.C. § 3599.111(B).

Although specific mention of the prohibition on fee-per-signature payment is arguably redundant,

---

[2] The two "artificial distinctions" alleged by Petitioner are, first, that the penalty for violation of the Ohio statute is more severe than the penalties for the other state statutes, and, second, that the Ohio statute is more restrictive than the others. Pet. 13.

the Statute's meaning and application are nonetheless clear. Thus, Petitioner's accusation that the court "manufactured" an "artificial distinction" by reading the Statute to prohibit payment to petition circulators on any basis other than time worked is simply unwarranted. The court did not err in its "plain reading" of the Statute. Nor did the court err when—in order to demonstrate agreement in principle with the previous circuit decisions—it noted the obvious distinctions between the Statute and the laws upheld by the other circuits (*i.e.*, that it is more restrictive and the sanctions are more severe).

Moreover, even if the Statute were "arguably ambiguous," the Sixth Circuit has no authority, as Petitioner erroneously contends (Pet. 11), to narrowly construe the Statute to avoid a constitutional infirmity, for federal courts are not authorized to construe state statutes. See, *e.g.*, *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 370 (1971) ("we lack jurisdiction authoritatively to construe state legislation."); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("it is not within our power to construe and narrow state laws.") The cases cited by Petitioner in support of its "constitutional avoidance" argument, Pet. 16-17, save one, involved *federal* statutes, which federal courts have authority to narrowly construe. *Thirty-Seven Photographs*, 402 U.S. at 369. The other case, *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383 (1988), involved a state statute, but the Court did not narrowly construe it; rather, the Court appropriately deferred to the Virginia Supreme Court (via certification) to construe the statute. *Id.*

at 395-96. Thus, the court of appeals was not required—indeed, it would not even have been *permitted*—to narrowly construe the Statute, even if by doing so it could have avoided the constitutional infirmity presented by the Statute's plain language.

2. The second false assumption in Petitioner's argument is that these allegedly manufactured distinctions between Ohio's regulation and the other regulations were actually the critical factor in the court's decision. As the court noted, even if the Statute were "substantively identical" to the other laws considered by its sister courts (or even if it were less restrictive), the outcome of this case would not necessarily have been any different.

> We take no position on the hypothetical question of whether, if Ohio were to enact a partial ban similar to Oregon's, North Dakota's or New York's, that partial ban would be subject to the less exacting review of *Timmons*. *The constitutional analysis is, as we have noted, fact- and context-intensive.* There may be significant differences between how Ohio and those other States govern and operate their respective petition drives and elections which would make even a lesser ban in Ohio subject the more exacting scrutiny of *Meyer*.

Pet. App. 23a, n.3 (emphasis supplied).

In determining the severity of the burden imposed by Ohio's statute, the court did look at the details of the Statute itself. Equally important to the

court's decision, however, were the particulars of Ohio's entire petition and election context. Comprehensive regulation of these matters being so different from state to state, the court explained, it is to be expected that divergent results will arise even though the laws being considered may be similar in many respects. *Id.*

Petitioner, however, argues that if the Sixth Circuit had interpreted the Statute to be "substantively identical" to the other state bans, it would have been required by this conclusion to follow the "clear precedent" of the other circuits and uphold the Ohio statute. Pet. 13. This is manifestly incorrect, if not absurd. The Sixth Circuit is not obligated to reproduce the *outcome* of the (fact-intensive) cases from other circuits. To the contrary, its only duties are to review and assess the facts of *this* case, and to apply the proper legal standard. And, as Petitioner concedes (*id.* at 24), that is exactly what it did.

To be sure, the Sixth Circuit prudently examined the per-signature payment bans at issue in the other cases as comparators, and looked to the circuit decisions for guidance on the proper application of the *Timmons-Buckley* analysis. Pet. App. 15a-16a. In so doing, the court properly recognized the importance of the finding, in each of the other cases, that the plaintiffs did not demonstrate a severe burden on the petition process. *Id.* at 13a-15a.

While the Sixth Circuit's fact-intensive approach led to a different conclusion than those reached by its sister circuits, it was, to be sure,

entirely consistent with this Court's precedents. Indeed, this Court has repeatedly said, "[No] litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." *Buckley*, 525 U.S. at 192. Such judgment is exactly what the Sixth Circuit exercised in the present case—it carefully examined the evidence and vigilantly made the hard judgment that needed to be made "to guard against undue burdens to political conversations and the exchange of ideas." *Id.*

Unsatisfied with this approach (or perhaps with just the outcome it produced), Petitioner proposes a different standard, one that *would* be a "substitute for the hard judgments that must be made." Indeed, in place of the longstanding *Timmons-Buckley* standard—requiring a case-by-case assessment of the burden imposed by the challenged restriction—Petitioner implicitly urges this Court to adopt a one-size-fits-all, universally-applicable standard, the application of which would result in courts upholding *all* pay-per-signature bans, regardless of the burden they might impose on core political speech rights. Under this novel and unprecedented theory, once a circuit court upholds a petition regulation (such as a pay-per-signature ban), subsequent circuit courts reviewing a "substantively identical" petition regulation (from a different state) would be required to abandon the severe burden test and blindly follow the "clear precedent" from the other circuits. Such a test is neither sensible nor justifiable, and should be rejected.

Each of the four circuits that has reviewed pay-per-signature bans has consistently applied the *Timmons-Buckley* standard when reviewing similar laws. The different conclusions reached were merely the result of the different factual circumstances each case presented. The Sixth Circuit's ruling participates in the consensus. There is no conflict.

C.

To be sure, the fact- and context-specific nature of the *Timmons-Buckley* standard has been acknowledged by all of the circuits that have decided challenges to pay-per-signature regulations to date. As elaborated below, in each of these cases, the outcome hinged not upon the different legal principles involved, nor even on the differences in the laws, but almost entirely on the degree to which each party met its evidentiary burden.

In *IRI*, the Eighth Circuit's decision upholding North Dakota's ban on per-signature payments resulted from the plaintiffs' failure to produce any "evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures." *Id.*, 241 F.3d at 618. And due to the lack of any evidence that the ban imposed a severe burden on the plaintiffs, the state did not need to satisfy strict scrutiny. Instead, the paucity of evidence introduced by the state (that fraud had been committed by circulators who had been paid by the signature), and the state's assertion that the measure was necessary "to insure the integrity of the initiative process," were sufficient to justify the ban. *Id.*

Likewise, in *Prete* the Ninth Circuit noted at the outset that its decision upholding Oregon's pay-per-signature ban was based largely upon plaintiff's failure to meet its evidentiary burden.

> To be clear, we do not hold that Measure 26 is facially constitutional. Rather ... we hold that because the district court did not clearly err in determining plaintiffs failed to establish that Measure 26 ... imposes a "severe burden" under the First Amendment ..., we conclude the district court did not err in upholding the constitutionality of Measure 26 as applied. *We express no opinion, however, regarding whether Measure 26 could withstand strict scrutiny had plaintiffs proven the measure imposed a "severe burden" under the First Amendment.*

438 F.3d at 970, n.29 (emphasis supplied).

Moreover, and contrary to Petitioner's insistence upon an across-the-board ruling, the Ninth Circuit recognized the context-limited character of its decision. Even within its own circuit, courts have reached opposite conclusions. Indeed, pay-per-signature restrictions have been invalidated in Washington and Idaho, see *LIMIT v. Maleng*, 874 F. Supp. 1138 (W.D. Wa. 1994), and *Idaho Coalition for Bears v. Cenarrusa*, 234 F. Supp.2d 1159 (D. Id. 2001), but have been upheld in Oregon. See *Prete*, 2004 U.S. Dist. LEXIS 28738 (D. Or. Feb. 18, 2004), *aff'd*, 438 F.3d 949 (9th Cir. 2006). The difference

between these decisions, according to the Ninth Circuit, is that in Washington and Idaho "the state defending the prohibition on per-signature payment for petition circulators failed to present any evidence that per-signature payments increased fraud," whereas in Oregon the state satisfied that burden. *Id.*, 438 F.3d at 970, n.29. The Ninth Circuit implicitly recognized that despite their different outcomes, these decisions could peacefully co-exist within the same circuit (which they still do) because the cases were decided not on the nature of the bans or the legal standard applied, but on the sufficiency of the evidence.

Lastly, in *Person* the Second Circuit expressly agreed with the approach of the Eighth and Ninth Circuits, holding that a state law prohibiting payment on a per-signature basis did not constitute a *per se* violation of the First or Fourteenth Amendments. Rather, the plaintiff's claim that the ban was unconstitutional simply lacked sufficient support "on the record presented." *Id.*, 467 F.3d at 143.

The one simple but critical difference between the present case and those decided by the other circuits is that in each of those cases, the plaintiffs failed to satisfy their evidentiary burden. But in this case, CTR satisfied its burden, having presented evidence that the Statute imposes a severe burden on its core political speech rights. This triggered more-exacting review, which the State was unable to withstand.

A consistent application of these settled precedents allows pay-per signature bans to be

lawful in some states while not in others; this is how the *Timmons-Buckley* standard is designed to work. In the present case, this is precisely how it has worked. This Court should deny review.

II. PETITIONER'S UNWARRANTED CONCERN THAT THE COURT OF APPEALS DIMINISHED THE IMPORTANCE OF ITS INTERESTS DOES NOT JUSTIFY REVIEW BY THIS COURT.

Petitioner next contends that the Court should grant review to "vindicate" the State's important interests in protecting ballot integrity and in preventing fraud in the electoral process, which it claims the Sixth Circuit "undermined" in its decision. Pet. 17-24. This is hardly a rousing argument for the necessity of this Court's corrective intervention. Indeed, "vindicating an important government interest" is not identified in Rule 10 as a consideration justifying review.

Nonetheless, Petitioner contends that this case merits review because the Statute is necessary to combat fraud "by removing a direct incentive to unlawfully pad the number of signatures obtained." Pet. 23-24. But this argument is not new, nor is this the first time this Court has heard it.

Indeed, in *Meyer v. Grant*, the State of Colorado offered this same justification in support of its ban on payment to circulators. This Court squarely rejected it, stating:

> we are not prepared to assume that a professional circulator ... is any more likely to accept false signatures than a

> volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.

486 U.S. at 438; see also *Buckley*, 525 U.S. at 203-04 (quoting same and also noting that "the risk of fraud ... is more remote at the petition stage of an initiative than at the time of balloting.")

The Sixth Circuit's by-the-book application of the *Timmons-Buckley* test did not diminish or undermine the State's important interest in eliminating election fraud. To the contrary, the Sixth Circuit affirmed that the State's interest is not only important, but *compelling*. Pet. App. 24a. Nevertheless, because the court concluded that the Statute was not narrowly (or even reasonably) tailored to protect those interests (*id.*), it found the Statute unconstitutional. *Id.* at 27a. The State's assertion that this conclusion somehow diminishes the importance of those interests, however, in addition to being inaccurate, is simply not a compelling reason for a writ of *certiorari* to be granted. Accordingly, this Court should decline review.

III. PETITIONER'S ASSERTIONS THAT THE COURT BELOW ERRED IN ITS FACTUAL FINDINGS AND THAT IT MISAPPLIED WELL-SETTLED LAW ARE NOT COMPELLING REASONS TO GRANT A WRIT OF *CERTIORARI*.

In a final plea for the Court to accept this case for review, Petitioner offers a wholly uncompelling reason, which amounts to "the lower court got it wrong." Pet. 24-37. Petitioner contends, in

particular, that the Sixth Circuit misapplied the *Timmons* standard, because that standard should only be applied to laws burdening *constitutional* rights, and no such right is implicated by the Statute. Pet. 26-27. Petitioner also argues that the Sixth Circuit's factual findings are erroneous (Pet. 28-30) and that the court erred in requiring the State to demonstrate that the Statute is narrowly tailored. Pet. 31-37.

As elaborated below, these arguments constitute nothing more than a direct attack on the lower court's application of well-settled law and its factual findings, matters well outside the scope of appropriate considerations for granting review.

A.

Petitioner initially contends that the Sixth Circuit misapplied *Timmons* because that case only applies to laws that "burden[] a *constitutional* right." Pet. 26 (emphasis in original). According to Petitioner, the complete ban struck down in *Meyer* "*dramatically* limited the number of voices to just volunteers." Pet. 26 (emphasis supplied). Unlike the laws at issue in *Meyer* and *Buckley*, Petitioner says, this particular Statute "regulates only payment methodology, not the communicative aspect of signature-gathering." Pet. 26.

This is not a compelling reason to grant a writ of *certiorari*. Even if it were, Petitioner's alleged basis for criticizing the court's application of *Timmons* is unsound. The constitutional implications of the Colorado ban at issue in *Meyer* and the ban at issue in this case are

indistinguishable. If there is any difference between them whatsoever, it can only be, at best, a difference of degree. The decision in *Meyer* hinged on the evidence that some circulators would not work unless they were paid. Although this didn't eliminate expression altogether (since the State of Colorado benevolently chose not to prohibit volunteer circulators), it did reduce the quantity of expression.

In the same way, the evidence here shows that some circulators will not work unless they are paid *by the signature*. This too, though it doesn't eliminate expression altogether, and arguably allows more expression than Colorado's complete ban on payment (the State of Ohio benevolently allowing both volunteer circulators *and* circulators paid on the basis of time worked), it still, as in *Meyer*, results in less expression and, thus, is equally a burden on a constitutional right.

In both cases, the effect of the laws was to reduce core political speech. The law in *Meyer* may have reduced speech more than the law in Ohio. It does not matter. The difference is one only of degree. Nor does it matter (for purposes of this argument) whether the laws had a *direct* effect on speech, or an *indirect* effect. Either way, the effect of the law was the same: to reduce constitutionally-protected speech, thereby triggering application of the *Timmons-Buckley* standard. Therefore, even if the alleged misapplication of a legal standard were a compelling reason to grant review, the Sixth Circuit's proper application of *Timmons* would eliminate it from contention in this case.

B.

Petitioner next asserts that the Sixth Circuit's factual findings are erroneous—that the evidence does not support the court's conclusion that the Statute imposes a severe burden on CTR's core political speech rights. Pet. 28-30. This is not a compelling reason for the Court to review this case. See Sup. Ct. R. 10 (*certiorari* is "rarely granted when the asserted error consists of erroneous factual findings"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) (*certiorari* not granted "to review evidence and discuss specific facts").

C.

Finally, Petitioner argues that, because "no one disputes" that the pay-per-signature arrangement induces circulators to engage in fraud, the State should not have been required to present any evidence to that effect. Pet. 31-33. It argues also that the court misapplied *Timmons* by requiring the State to demonstrate that the Statute is narrowly tailored. Pet. 34-37.

Like those that came before it, these are not compelling reasons for this Court to grant a writ of *certiorari*. Even if they were, it simply is not true that no one disputes the link between payment methods and fraud. This assumption was challenged, not only by Respondents, but also by the Sixth Circuit. Pet. App. 25a.

Equally without merit is the argument that, by requiring the Statute to be narrowly tailored, the Sixth Circuit misapplied *Timmons*. To begin with,

the assertion that the court misapplied a legal standard, as already noted, is not worthy of *certiorari*. See Sup. Ct. R. 10. Furthermore, Petitioner confuses the *standard* applied in *Timmons* with the particular facts and holding of the case. "Empirical verification" (Pet. 31) of fraud was not required in *Timmons* precisely because the Court found that the Minnesota statutes did not impose a severe burden on the plaintiffs' associational rights. The "lesser burdens" triggered "less exacting review." *Id.*, 520 U.S. at 358. But if the Court had found that the statutes imposed a severe burden, such evidence would have been required and the statutes would have been subject to strict scrutiny (*i.e.*, narrowly tailored to advance a compelling state interest). *Id.*

That is the case here. Had the Sixth Circuit found that the Statute only imposed a lesser burden, the State's evidence likely would have been sufficient (for in most cases where the burden imposed is only slight, the mere *assertion* by the State of its desire to prevent fraud is enough). But under the *Timmons-Buckley* standard, once the plaintiff proves that the challenged restriction imposes a severe burden, the government "faces a 'well-nigh insurmountable' obstacle to justify it." Pet. App. 24a (quoting *Meyer*, 486 U.S. at 425).

CONCLUSION

This Court has recognized the paramount importance of the First Amendment right to engage freely "in discussions concerning the need for change," including change accomplished through petition speech and elections. *Meyer*, 486 U.S. at 421.

Likewise, this Court has affirmed the importance of the States' interests in protecting the electoral process. Indeed, how to go about striking the proper balance between these two important interests is itself a question of great significance.

But the fact of the matter is, this very significant question has already been clearly and consistently answered by all the circuits that have taken it up. It has been answered in such a way as to give the States perfectly-comprehensible guidance in how to fully protect both interests.

The standard used by each of the circuits is one and the same. The occasional differences in outcome are based entirely on the different facts that were before each court. And that is all we have here. The Sixth Circuit has applied precisely the same standard used by the other circuits, but has applied it to a unique set of facts. The outcome is not, then, a result of any split among the circuits, but merely the product of a fact-intensive application of this Court's well-settled standard. The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

DAVID R. LANGDON
LANGDON LAW LLC
11175 Reading Road
Suite 104
Cincinnati, Ohio 45241
(513) 733-1038
(513) 577-7383 fax

Counsel for Respondents

Supreme Court, U.S.
FILED
OCT 2 1 2003
OFFICE OF THE CLERK

109

(4)

No. 08-151

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC MEUTI
KIMBERLY A. OLSON
Deputy Solicitors
SHARON A. JENNINGS
Assistant Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
State of Ohio

WILLIAM P. MARSHALL
6 Heather Court
Chapel Hill, NC 27517

Special Counsel for the
Attorney General of Ohio

72134

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF OF THE PEITIONER 1

A. A clear division of authority exists among the courts of appeals in applying the *Timmons* balancing test to payment-per-signature rules. 1

B. The Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court 6

1. Ohio's law does not severely burden First Amendment rights. 7

2. Election-fraud prevention justifies Ohio's reasonable, non-discriminatory regulation. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Buckley v. American Constitutional Law Foundation,
525 U.S. 182 (1999) 6, 7, 8

Buckley v. Valeo,
424 U.S. 1 (1976) 7

Caruso v. Yamhill County,
422 F.3d 848 (9th Cir. 2005) 4

Citizens for Tax Reform v. Deters,
518 F.3d 375 (6th Cir. 2008) 3, 4, 5, 8

Crawford v. Marion County Election Board,
128 S. Ct. 1610 (2008) 6, 9

Georgia v. Randolph,
547 U.S. 103 (2006) 5

Initiative & Referendum Institute v. Jaeger,
241 F.3d 614 (8th Cir. 2001) 2, 3

Krislov v. Rednour,
226 F.3d 851 (7th Cir. 2000) 4

League of United Latin American Citizens v. Clements,
999 F.2d 831 (5th Cir. 1993) (en banc) 4

Meyer v. Grant,
486 U.S. 414 (1988) 6, 7

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 8

Perry Education Association v. Perry Local Educators' Association,
460 U.S. 37 (1983) 5

Person v. New York State Board of Elections,
467 F.3d 141 (2d Cir. 2006) (per curiam) 2

Prete v. Bradbury,
438 F.3d 949 (9th Cir. 2006) 1, 3, 5

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) ..... *passim*

United States v. Kokinda,
497 U.S. 720 (1990) 5

Federal Constitutional Provisions and Statutes **Page(s)**

United States Constitution, First Amendment ..... *passim*

State Constitutional Provisions and Statutes **Page(s)**

N.D. Cent. Code § 16.1-01-12(11) 2

N.Y. Elec. Law § 17-122(4) 2

Ohio Rev. Code § 3599.111(D) 1, 5

Or. Admin. R. 165-014-0260 5

Or. Const. art. IV, § 1b 1

REPLY BRIEF FOR THE PETITIONER

This case raises the critical issue of how States may regulate an increasingly important part of the election process—the gathering of signatures to place initiatives and candidates on the ballot. In its Brief in Opposition ("Opp."), Respondent Citizens for Tax Reform ("CTR") only confirms, rather than negates, the need for this Court to review the Sixth Circuit's erroneous opinion. In holding that Ohio's payment-per-signature ban violates the First Amendment, the Sixth Circuit departed from the decisions of both its sister circuits and this Court, and it improperly restricted Ohio's ability to combat demonstrated fraud in the petition-circulating process.

A. A clear division of authority exists among the courts of appeals in applying the *Timmons* balancing test to payment-per-signature rules.

The Sixth Circuit's decision conflicts squarely with the decisions of three other courts of appeals. The Ohio law at issue provides: "No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked." Ohio Rev. Code § 3599.111(D). Other States' prohibitions, upheld by other courts of appeals, are virtually identical. The Oregon law sustained by the Ninth Circuit prohibits paying circulators "based on the number of signatures obtained on an initiative or referendum petition" and permits only those payment methods that are "not based, either directly or indirectly, on the number of signatures obtained." *Prete v. Bradbury*, 438 F.3d 949, 952 (9th Cir. 2006) (quoting Or. Const. art. IV, § 1b). Along strikingly similar lines, New York—in a law upheld by the Second

Circuit, *Person v. N.Y. State Bd. of Elections*, 467 F.3d 141 (2d Cir. 2006) (per curiam)—prohibits paying circulators "upon the basis of the number of names to such petition procured by such person, or at a fixed amount per name." N.Y. Elec. Law § 17-122(4). And the North Dakota law sustained by the Eighth Circuit bans payment "'on a basis related to the number of signatures obtained.'" *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (quoting N.D. Cent. Code § 16.1-01-12(11)) ("*IRI*").

CTR identifies no textual differences between these various statutes, nor could it, since none exists. Instead, CTR asserts that the division of authority is illusory because the Sixth Circuit applied the same *standard* as the Second, Eighth, and Ninth Circuits; the outcomes differed only because each case featured different *evidence*. CTR is incorrect.

To begin with, even if the circuit courts all cited *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), that does not mean, as CTR suggests, that they all applied the same standard. For one thing, CTR ignores the strong similarities in the evidence offered in each of the relevant cases. Moreover, to the extent that CTR is correct that evidentiary differences existed among the various cases, that fact only underscores the degree to which the lower courts are confused over how to apply the *Timmons* framework. Specifically, the appeals courts are sharply divided over how, under *Timmons*, to assess the severity of the burden on speech rights and the strength of the State's interest in combating fraud.

CTR's evidence that the Ohio statute burdens its speech rights is strikingly similar to the evidence rejected as insufficient in *Prete*. In both cases, the pay-per-signature ban's challengers introduced affidavits indicating that the prohibition would make signature gathering more expensive and might cause "professional" circulators to quit working in the State. *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 383-84 (6th Cir. 2008); *Prete*, 438 F.3d at 964-65. In *Prete*, that evidence was insufficient to establish a "severe burden" under *Timmons*. *Prete*, 438 F.3d at 965-66. Yet in this case, the district court and the Sixth Circuit reached the opposite conclusion. *Citizens for Tax Reform*, 518 F.3d at 386-87. Thus, the Sixth Circuit has disagreed with its sister circuits on how to assess evidence in determining the severity of the burden on speech rights.

The Sixth Circuit also disagreed with its sister circuits on how to apply the *Timmons* "state interest" prong. In *IRI*, North Dakota introduced evidence of a correlation between payments by the signature and petition fraud: Students were paid 25 cents per signature, and "[t]here were reported irregularities—taking names out of the phone book, etc." *IRI*, 241 F.3d at 618. Ohio introduced precisely the same type of evidence—that, among other things, circulators for Ralph Nader's 2004 presidential candidacy who were paid by the signature engaged in fraud. See *Citizens for Tax Reform*, 518 F.3d at 387. The State also introduced evidence, including an affidavit from a member of a county board of elections and an indictment, revealing specific instances of fraud committed by circulators who were paid by the signature. See Pet. at 6. Notwithstanding *IRI*, the

Sixth Circuit disregarded all of this evidence as insufficient because it proved only correlation, not causation—even though the Eighth Circuit did not insist on evidence of causation. *Citizens for Tax Reform*, 518 F.3d at 387.

The strong parallels between the evidence that other courts accepted but the Sixth Circuit rejected shows just how divided the lower courts are in applying *Timmons*. This Court's guidance is required.

Moreover, even if CTR is correct (and it is not) that the divergent results of the circuit courts is explained entirely by those courts' differently weighing the interests involved, that assertion still does not explain away the conflict among the various courts. First and foremost, determining the existence of a burden and evaluating the strength of the State's interest are, by their nature, legal judgments, and opposing answers to these inquiries are, by definition, conflicts. See, e.g., *Caruso v. Yamhill County*, 422 F.3d 848, 859 (9th Cir. 2005) (character and extent of a statute's burden on a petition circulator's First Amendment rights amounts to a question of law); *Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000) (character and extent of a ballot-access statute's burden on candidates' First Amendment rights is a question of law); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993) (en banc) ("With issues of substantive due process, equal protection, and the First Amendment, the weight of a state's interest has always been a legal question, not a factual one."). Second, if CTR's approach to defining a division of authority were to prevail, a

"circuit split" would be a rare bird indeed. Many divisions in authority could be attributed to a differing weighing of the record—such as what constitutes a reasonable search and seizure, e.g., *Georgia v. Randolph*, 547 U.S. 103, 108 (2006), or a reasonable restriction of speech on government property, e.g., *United States v. Kokinda*, 497 U.S. 720, 724 (1990); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 n.6 (1983)—rather than the application of a different legal standard. This Court's review is warranted not only when the circuit courts diametrically disagree on the application of particular tests, but also when they reach opposite outcomes in functionally identical cases. The latter is the situation here.

Finally, the Sixth Circuit did not and cannot avoid a conflict with its sister circuits by adopting an unduly broad reading of Ohio's law. The appeals court read the statute to prohibit a series of practices that the Ninth Circuit held permissible under Oregon's pay-per-signature prohibition, such as giving raises to productive circulators and terminating unproductive circulators. *Citizens for Tax Reform*, 518 F.3d at 385 (quoting *Prete*, 438 F.3d at 952 n.1 (quoting Or. Admin. R. 165-014-0260)). The question whether Ohio prohibited these practices was not briefed before the court; CTR was never charged with violating the statute for engaging in them; and CTR never sought a declaration that these practices would not violate the statute. In any event, by applying the Ohio statute to hypothetical scenarios, the Sixth Circuit misinterpreted the law, because the statute's requirement that signature-gatherers be paid "on the basis of time worked," Ohio Rev. Code § 3599.111(D), does not on its face prohibit

giving performance-based raises or terminating unproductive employees. Indeed, at oral argument, counsel for Ohio assured the Sixth Circuit that such practices are permissible under the statute. Compact disc: Oral Argument in *Citizens for Tax Reform v. Deters*, 6th Cir. Case No. 07-3031 at 2:00-2:12, 3:26-5:28 (Nov. 30, 2007). In any event, even if the Ohio statute were properly interpreted as broadly as the Sixth Circuit suggests, nothing in the record suggests that the State's interest in banning fraud or the ostensible burden imposed on CTR by the application of the statute would be materially altered.

B. The Sixth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court.

The Sixth Circuit not only created a conflict with its sister circuits, but it also misapplied this Court's precedents governing both the "severe burden" and "state interest" prongs of the *Timmons* balancing test. The court relied on *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), to determine that Ohio's law "severely burdens" core political speech, but the regulations in *Meyer* and *Buckley* were nothing like Ohio's pay-per-signature ban. The Sixth Circuit also unjustifiably—and inconsistently with this Court's recent decision in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008)—minimized Ohio's interest in preventing election-related fraud. These shortcomings in the Sixth Circuit's decision on an important constitutional question justify this Court's review.

1. Ohio's law does not severely burden First Amendment rights.

Ohio's law does not impair CTR's abilities to communicate with voters or to achieve ballot access for its issues, particularly when compared to the two decisions of this Court invalidating petitioner regulations. The statute in *Meyer* completely banned the use of paid circulators, thereby dramatically limiting the number of voices to volunteers and only volunteers. *Meyer*, 486 U.S. at 419. The statute also barred proponents from using their money to amplify their speech—a prohibition that this Court likened to the invalidity of limits on independent political expenditures under *Buckley v. Valeo*, 424 U.S. 1 (1976). See *Meyer*, 486 U.S. at 419. Similarly, in *Buckley v. American Constitutional Law Foundation*, the Court found that requiring circulators to be registered voters significantly reduced the number of available voices. Only 65% of the voting-age population was registered to vote, so a requirement that eliminated 35% of the population caused a direct "speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*." *Buckley*, 525 U.S. at 193 n.15, 194.

Ohio's regulation, by contrast, neither bars a single voice, cf. *Buckley*, 525 U.S. at 194-95, nor prevents a citizen from using money to amplify her message, cf. *Meyer*, 486 U.S. at 419. Ohio's law affects only petition circulators who insist on being paid by the signature. And, as Ohio demonstrated in its Petition, CTR failed to show that Ohio's law affects a significant number of petition circulators. Pet. at 28-30. Indeed, CTR offered the testimony of only one professional circulator who said that she

would not work in Ohio if the ban went into effect. Pet. at 28. Ohio's law is therefore qualitatively different from the regulations at issue in *Meyer* and *Buckley*, and it is more than justified by the countervailing state interests.

2. Election-fraud prevention justifies Ohio's reasonable, non-discriminatory regulation.

Ohio's law is amply supported by the commonsense notion that payment by the signature encourages fraud. More than that—and even though settled law does not require a State to let fraud happen before it can regulate—Ohio introduced evidence that fraud has occurred in the State during the petition-circulating process. The Sixth Circuit erroneously ignored both common sense and Ohio's proffered evidence when it struck down the ban, *Citizens for Tax Reform*, 518 F.3d at 387, and CTR has not rebutted Ohio's showing that the Sixth Circuit's fundamental errors require this Court's review.

First, the Sixth Circuit's and CTR's approach would require States to suffer the adverse consequences of petition fraud before legislating, even though this Court's decisions support the State's right to act proactively to prevent fraud. In *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), for example, the Court advised against prohibiting proactive state solutions: "To require States to prove actual [fraud] . . . would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action." *Id.* at 195. That situation, the Court explained, would be untenable, because

"[l]egislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively." *Id.*

Second, CTR asserts that a court should defer to a State's interest in preventing fraud only after determining that the burden is not severe, see Opp. at 23, but that approach flips this Court's case law on its head. In *Crawford*, for instance, this Court first considered the State's important interest in preventing election fraud, and then, with that interest as a backdrop, evaluated the alleged burden on First Amendment interests. The Court recognized how high a standard the plaintiffs faced: "Given the fact that petitioners have advanced a broad attack on the constitutionality of [the statute] . . . they bear a heavy burden of persuasion." *Crawford*, 128 S. Ct. at 1622. Just as the *Crawford* plaintiffs did not meet that high burden, *id.* at 1624, so, too, CTR fails to show that Ohio's interest in protecting against fraud in insufficient to justify the payment-per-signature prohibition.

* * *

The Sixth Circuit has painted Ohio into a corner and then tied its hands. The appeals court's opinion tells the State that it must wait for fraud to occur before it can regulate, and even then the court will give credence to the State's evidence of fraud only if the court decides that the burden on the petition circulators—which need not be supported by much, if any, evidence—is less than severe. That approach directly conflicts with the decisions of both this Court and the courts of appeals. This Court's review is warranted.

CONCLUSION

For all of the above reasons, the Court should grant Ohio's Petition for Certiorari.

Respectfully submitted,

WILLIAM P. MARSHALL
6 Heather Court
Chapel Hill, NC 27517

Special Counsel for the
Attorney General of Ohio

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC
MEUTI
KIMBERLY A. OLSON
Deputy Solicitors
SHARON A. JENNINGS
Assistant Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
State of Ohio

October 21, 2008